

**MAKING CHILDREN VISIBLE TO THE
IMMIGRATION ADMINISTRATION:**

**A Study of the Right of the Child to
Participate in Norwegian Asylum Proceedings**

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Abbreviations

AID:	Ministry of Labour and Social Inclusion (Arbeids- og Inkluderingsdepartementet)
CEAS:	Common European Asylum System
CRC:	The 1989 Convention on the Rights of the Child
CRC Committee:	The United Nations Committee on the Rights of the Child
Refugee Convention:	The 1951 Convention Relating to the Status of Refugees
Dublin Convention:	The Convention Determining the State Responsible for Examining Applications Lodged in one of the Member States of the European Communities
ECHR:	The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
EU:	The European Union
ICCPR:	The 1966 International Convention on Civil and Political Rights
ICESCR:	The 1966 International Convention on Economic, Social and Cultural Rights
NOAS:	Norwegian Organization for Asylum Seekers
PRESS:	Save the Children Youth Norway
1967 Protocol:	The 1967 Protocol Relating to the Status of Refugees
UDI:	The Directorate of Immigration (Utlendingsdirektoratet)
UNE:	The Immigration Appeals Board (Utlendingsnemnda)
UNHCR:	The United Nations High Commissioner for Refugees
UNHCR Guidelines:	“Refugee Children. Guidelines on Protection and Care”1994
UDHR:	Universal Declaration of Human Rights, 1948

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Introduction

1.1 Background

Migration in Europe is not a new phenomenon. For various reasons such as poverty, political or religious persecution, colonization or war, Europeans have for several hundred years left their home countries for a new start on distant continents. Also within Europe, there has been mass migration due to different causes. In the 1960`s, numerous Mediterranean “guest workers” sought employment in Western Europe, and during the war at the Balkans, the same countries received a large-scale influx of refugees. Since the 1980`s, the number of asylum seekers coming to Europe from the third world has been increasing. The arrival of culturally and religiously different immigrants has coincided with times of economic recession in Europe, which combined with a heightened fear of terrorism post 2001 has lead to intense debate on immigration policies.

At a time when large numbers of people flee civil war and conflict situations, it is necessary to discuss whether their interests are protected on the national level in accordance with the refugee and human rights framework. A type of warfare aimed at civilians; like ethnic persecution; considers also small children to be part of the enemy. Whereas Europe is developing common asylum policies through increasingly strict regulations, the desperate people trying to storm security fences in Morocco fail to make it even to the newspaper headlines of the industrialized countries. Whether they are unaccompanied or travel with family members, children constitute a significant part of asylum seekers and refugees. The United Nations High Commissioner for Refugees (UNHCR) estimates some 47 per cent of the persons of concern to the organization to be children under the age of 18.¹ Although most people fleeing from wars perceive themselves as refugees, they may in the receiving countries not always be regarded as having a right to

¹ UNHCR 2004 Global Refugee Trends: 5
<http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=42b283744>

protection within the meaning of the 1951 Convention on the Status of Refugees.² In particular, the present situation makes it difficult for children to be recognized in their own right.³

Norway is a sparsely populated country which both geographically and politically is located in the outskirts of Europe. Although not a member of the EU, the country is nonetheless part of European policies on asylum and immigration. Norway is a welfare state which at home and abroad is looked upon as an advocate for human rights. Nevertheless, children seeking asylum constitutes a very vulnerable group in the Norwegian society. Norway's asylum practice in regard to children has been repeatedly criticized by the Committee on the Rights of the Child, as well as by domestic organizations working with children.⁴

The participation rights of children in asylum proceedings stipulated in the Convention on the Rights of the Child,⁵ and the obligations and dilemmas this may raise for Norwegian asylum authorities is the central topic of my thesis. Pr 30.04.2006, approximately 2000 children were living in Norwegian reception centres together with their families.⁶ Including appeals, the administrative procedures can extend to a number of years. All this time the children are living at reception centres, places which are not very suitable for families and were meant for temporary stay only, but which often end up being their homes for several years. As children are included in the asylum applications of their parents, they risk having their own problems and experiences concealed. The best manner to make the situation of children visible to the immigration administration is to provide them with mechanisms in the asylum procedures through which they can make their own voices heard.

1.2 Object and purpose of the study

The thesis seeks to explore the extent to which the Convention on the Rights of the Child has been implemented by Norwegian asylum authorities, with respect to two principles; the right of the child to be heard pursuant to the Convention's Article 12, and the principle of the best

² Hereinafter, the Refugee Convention.

³ Andersson, Hans E.(2005), p.1.

⁴ All three Concluding Observations to Norway's reports by the CRC Committee have expressed concerns for the situation of asylum-seeking children (see chapter 5).

⁵ Hereinafter, the CRC

⁶ E-mail from Paul Skoglund, UDI, 18.05.2006

interests of the child as stipulated in Article 3. I would like to investigate how children are heard in practice, and to what extent the views of the child are reflected in the outcome of the case. I would also like to address the challenges and dilemmas inherent in this right. An underlying object of this thesis is generally; to discuss the challenges European states encounter when attempting to balance immigration control with obligations arising from human rights instruments. More specifically, this problem will be illustrated by addressing one particular aspect of Norwegian refugee policies. The purpose of the research is to make visible that the experience of children, both in their country of origin and the process of awaiting the result of the asylum application in Norway has its place in the consideration of a family's case. My main research question reflects the two mentioned provisions of the CRC, namely Articles 3 and 12:

Is the right of children to participate in their own application process and the consideration of their experiences and best interests in asylum procedures sufficiently taken into account by immigration authorities, in accordance with the Convention of the Rights of the Child?

The research question is supported by three sub questions that hopefully will help me answer my main research question.

Firstly; **to what extent is the CRC actively used by the immigration authorities in the asylum procedures; and which dilemmas may arise from the obligations laid out in the Convention?**

Secondly; **do the views of children actually influence decisions, and if not, how can a genuine assessment of the best interests of the child be made?**

Finally; **Is the situation of children visible in decisions, and can the practice of standard answers be said to be fulfilling their right to due process protection?**

By visibility, I mean two things. Firstly, the child should be treated individually throughout the whole process, and the views of the child should be reflected in the outcome. Secondly, the child should be visible in negative decisions; in the sense that the reasons for refusal should be thoroughly grounded and analyzed with reference to CRC articles. The thesis aims to shed light on the dilemmas within the administration of immigration in taking participation rights of

children into consideration, and on highlighting the role of the caseworker in upholding human rights.

1.3 Definitions

For the purpose of this thesis, I find it necessary to clarify some central terms. Both in Norwegian legislation and in the CRC, a **child** is recognized as a person below 18 years of age.⁷ According to Article 1A(2) of the Refugee Convention, a **refugee** is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"(..) is unable or unwilling to return because of this fear. The principle of **non-refoulement** is the cornerstone of refugee protection, and is today considered to constitute customary law.⁸ The principle is derived from Article 33(1) of the Refugee Convention and spells out the obligation by governments not to return an asylum seeker to a place "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion". **Asylum** means a place of refuge for a refugee in a country other than the country of origin.⁹ An **asylum seeker** is a person "who asks the authorities of another country for protection and recognition as a refugee"¹⁰. The person is called an asylum seeker until a decision has been made on the application. **Refugee** status is in Norway granted to two groups; resettlement (quota) refugees and asylum seekers who have been granted asylum on the grounds of individual persecution. By **administrative proceedings**, I mean every aspect of the handling of the application for asylum, including the interview, the decision and the total case handling time, including the appeal. The term **asylum authorities** is used for both the Directorate of Immigration (UDI), the Immigration Appeals Board (UNE) and the Ministry of Labour and Inclusion (AID).

1.4 Sources and Methodology

The multifaceted nature of the topic asylum policies; with its inherent link between politics and law, requires an interdisciplinary approach. I will approach the law from the perspective of a

⁷ CRC, Article 1: "...a child means every human being below the age of eighteen years..".

⁸ Goodwin-Gill, Guy S. (1996) p.143

⁹ UDI: http://www.udi.no/upload/Faktaark/Engelsk/Asyl_engelsk.pdf

¹⁰ My translation. <http://www.nrc.no/abc.htm>

political scientist; trying to determine the state of the law as it is. The study is mainly conducted from a legal, human rights perspective, with focus on children's rights. Since my main task is to assess the implementation of the CRC, the examination of policies and practices also requires the use of methods from the social sciences.

I will consider universal and regional human rights documents and national legislation. These instruments include both "hard law" treaties like the CRC, and "soft law" instruments like the recommendations of the CRC Committee and the UNHCR Guidelines. Whereas "hard law" signifies treaties or conventions legally binding upon States Parties, "soft law" means standards which although not being legally binding may hold a high political and moral status internationally; like General Comments. Other sources used in the study are books and journals written by practitioners, Norway's reports to and recommendations from the CRC Committee, reports and studies made by NGO's and authorities, case law and information from official websites. As my thesis is mainly based on the practice and the exercise of discretion of existing rules and regulations, the aim of the research is to obtain first-hand knowledge from practitioners in the field. The thesis will thus be partly based on a qualitative analysis of material obtained through empirical research. The data was collected through individual semi-structured interviews with people in the immigration administration and relevant organizations. Although the interviews are guided by the same topics, the fact that the respondents have different roles and expertise in relation to the issue made the use of specific, adjusted questions necessary. Letting the respondents talk at length in their own words made it possible to establish their viewpoints, and allowed for unanticipated information to be discovered through the conversations.

1.5 Demarcation of the thesis

Although there are many important problems arising from domestic asylum policy, I will due to constraints on time and length have to limit my thesis to certain aspects of Norwegian asylum practice. I will, for instance, not consider the situation of unaccompanied minors in Norway, as these have very different procedures and much effort has been made to improve the conditions of this group. I will instead focus on the situation of accompanied children as their inclusion in their parents' cases potentially could conceal their own experiences and needs. Although other issues of relevance to asylum-seeking children will be touched upon, my main focus will be on

participation rights and the best interests of the child, and the obligations and challenges arising from the requirements from the CRC to the practice of asylum authorities.

The limited time frame of writing this thesis presents several challenges. First of all; Due to its political nature, the process from the proposition of new laws and regulations to its actual implementation may take a long time. Problems that are in a process of change may therefore be difficult to assess within the scope of the thesis. Due to the sensitive nature of the topic, I have had problems with getting all the material I needed for a thorough analysis (like a representative amount of decisions). I have therefore had to base some of my conclusions on the information provided by my respondents. Yet another difficulty is that the page limitation restricts the possibilities for including details about analyses and empirical data, as well as for considering issues in depth. Altogether; this may give me problems of generalising from my findings. Keeping this in mind, I nonetheless believe that my theoretical and empirical knowledge makes it possible to draw valuable inferences from the following analysis. For the most part, I have used a digital recorder to get the correct citations and limit misinterpretations. Lastly, I must point out that any mistakes or misinterpretations of reports or informants are entirely my own, and make reservations for possible recent changes which I have not included in my study.

1.6 Structure of the study

Chapter 2 provides an overview of the universal legal framework as well as the regional context, including implementation mechanisms. In Chapter 3, selected rights under the CRC of relevance to refugee and asylum-seeking children will be introduced and an in-depth analysis of article 3 and 12, and their implication for children in asylum proceedings, will be made. Chapter 4 focuses on Norwegian laws and practice, including asylum policy. The asylum agencies' procedures for interviewing children are the main focus of chapter 5. The concerns of NGO's with respect to the procedures and Norway's implementation of the CRC will be analyzed in chapter 5 and 6. The concluding discussion in chapter 7 will include a summary of the major findings of the thesis, as well as an assessment of recent positive developments, the dilemma of balancing interests and the scope of Norway's positive obligations. Some recommendations for the improved protection of children seeking asylum in Norway will be listed as an appendix.

2 International Human Rights Standards and Procedures

2.1 The Universal Legal framework

The protection of asylum-seeking and refugee children is principally enshrined in two international conventions: the Refugee Convention and its 1967 Protocol and the Convention on the Rights of the Child. There is a strong link between human rights law and refugee law which is reflected in the Preamble of the Refugee Convention, stating the pledge of the UN to “assure refugees the widest possible exercise of these fundamental rights and freedoms”. This phrasing has been interpreted to support reference to international human rights instruments when determining the rights of refugees. No international convention has been adopted on the issue of asylum. The reason for this is that States have been reluctant to adopt binding treaties which would oblige them toward refugees and thereby limit their sovereignty. International refugee protection has therefore been developed through the adoption of “soft law” instruments by i.a. the UNHCR. In the following, I will introduce the main international and regional framework relevant to children seeking asylum in Norway. The CRC will be discussed in Chapter 3.

2.1.1 The International Bill of Rights

The human rights of children seeking asylum are generally protected also by other human rights instruments. The so-called International Bill of Rights is constituted by the 1948 Universal Declaration of Human Rights (UDHR) and the two 1966 Covenants; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two Covenants are legally binding on States which have ratified them. Although the UDHR was originally not a legally binding document, it is now considered to be customary law. The Declaration’s Article 14 stipulates that “Everyone has the right to seek and to enjoy in other countries asylum from persecution”; thus recognizing the right to seek protection in another country as a universal human right. As a result, signatory States to the

Declaration are legally bound to let foreign nationals in their jurisdiction apply for asylum, while the obligation of sovereign States to grant asylum status is less strict.

2.1.2 The 1951 Convention relating to the Status of Refugees and its 1967 Protocol

The Refugee Convention was adopted is the main international instrument for the protection of refugees. The Convention was drafted as a response to the suffering of refugees during and after the Second World War, and laid out binding obligations of States Parties for the treatment of refugees.

Apart from article 22 on public education, there is a lack of child-specific provisions in the Convention. As the Convention does not distinguish between categories of people, all articles are nevertheless applicable to children. The UNHCR Handbook is an authoritative interpretation of the Refugee Convention, and confirms that the “same definition of a refugee applies to all individuals, regardless of their age”.¹¹ The Refugee Convention has been criticized for not being able to cover the needs of today’s refugees. The world has changed profoundly in the 55 years since the Convention was adopted. The mobility and global communications of today are unprecedented, and the character of wars and conflicts has changed. The massive refugee outflows resulting from warfare like ethnic cleansing are not always compatible with the notion of individual persecution, making categorization and definitions difficult. Nonetheless, one thing remains unchanged. People still have to flee persecution, conflicts and human rights violations, and need to seek refuge in other countries. Despite its flaws, the Refugee Convention remains the most important treaty when it comes to protecting refugees.

¹¹ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UNHCR , Geneva 1992. HCR/IP/4/Eng/REV.1

2.2 Monitoring bodies

2.2.1 The UN High Commissioner for Refugees (UNHCR)

The primary responsibility of the UNHCR is safeguarding the rights and well-being of refugees,¹² which includes monitoring the implementation of the conventions by States and coordinating international action aimed at the protection of refugees. In 1993 UNHCR adopted a Policy on Refugee Children, which implemented the CRC as its “normative frame of reference for UNHCR’s action” (para. 17).¹³ Five years earlier, the organization published its handbook “Refugee Children: Guidelines on Protection and Care”¹⁴, which defines the principles, objectives and practical measures for the protection and assistance of refugee children. Each chapter of these Guidelines holds the rights in the CRC as UNHCR standards; confirming the rights-based work of the agency. Moreover, the Executive Committee of the UNHCR (ExCom) adopts Conclusions on important policy issues concerning refugee protection, and has issued three Conclusions specifically on refugee children.¹⁵ These are soft law instruments and not legally binding on States, but the fact that the Conclusions are adopted by the UNHCR gives them substantial political and moral value.

2.2.2 The Committee on the Rights of the Child

The CRC Committee is recognized as the highest authority for the interpretation of the Convention. In its evaluation of periodic reports, the Committee urges States’ Parties to use the Convention as a guide in policymaking and implementation at all levels of the government. The treaty body addresses its concerns and recommendations to the government in the form of “concluding observations”. The Committee’s interpretations of Convention provisions are published as General Comments on selected issues. The Committee has e.g. published a General

¹²UNHCR Mission Statement:

<http://www.unhcr.ch/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b0249c71>

¹³ UNHCR Policy on Refugee Children, presented to the UNHCR Executive Committee, October 1993: Document EC/SCP/82, Para. 17.

¹⁴UNHCR Refugee Children: Guidelines on Protection and Care. <http://www.refugeelawreader.org/files/pdf/256.pdf>

¹⁵ No. 47 (XXXVIII) - 1987 - Refugee Children, No. 59 (XL)1989 - Refugee Children and No. 84 (XLVIII) - 1997 - Conclusion on Refugee Children and Adolescents. <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41b041534>

Comment on the treatment of unaccompanied and separated children outside their country of origin.¹⁶ In its consideration of the State reports the Committee has systematically stressed the importance of children's right to be heard.

2.3 The European Legal Framework

On the regional level, the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) is the key human rights document. A central provision for the protection of refugees and asylum seekers is Article 3 on the prohibition of torture or inhuman or degrading treatment or punishment. This provision can be linked to the principle of non-refoulement; prohibiting the expulsion or return of refugees to a territory where his or her life or well-being may be threatened. Through its case law, the European Court of Human Rights has developed into an important instrument for the protection of refugees and asylum seekers in Europe.

2.3.1 Harmonization of European Policies on Asylum

While Africa and Latin America have the OAU Convention and the Cartagena Declaration,¹⁷ Europeans have been reluctant to sign any binding treaties on refugees. Most of the development in this area has been in the form of non-binding policies and recommendations, leaving questions related to the granting of asylum to the discretion of States. The past years we have witnessed a decline in the number of asylum seekers to Norway which can be said to constitute part of a European trend. One explanation for this is that the number of conflicts bordering to Europe has fallen, and another cause is that the new measures within the EU and Schengen-countries have started to give effect. Most important of these are carrier sanctions, visa requirements to entry, the new Eurodac fingerprint register and the Dublin convention, which through the so-called "first country practice" determines the responsibility of member states in handling applications on asylum. The dilemma when control policies become too restrictive is that clandestine or illegal

¹⁶ General Comment no 6, 2005. <http://www.ohchr.org/english/bodies/crc/docs/GC6.pdf>

¹⁷ Both the 1969 Convention governing the specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration contain an expanded refugee concept.

immigration tends to increase, along with human suffering for the migrants and security problems for the authorities. The harmonisation of European policies on immigration has until recently been focused on efforts to limit entry of potential asylum-seekers. The work on developing a system for choosing those with the greatest need of protection and a refugee policy sharing the responsibility for asylum-seekers in Europe has not been a priority. This poses a serious challenge to the human rights and refugee-regime, which risks being undermined in the European protective wall-building. European States have tended to interpret the Refugee Convention's provisions rather restrictively; a reaction to the real and perceived abuse of strained asylum systems. Due to closed immigration channels, the asylum function remains one of the last possibilities of people to enter Europe. This inevitably leads to abuse by some individuals, which again leads to increased scepticism with the public and the authorities.

In the process of creating a Common European Asylum Policy, the EU has adopted a number of binding directives in the field of asylum and immigration. Although Norway is not an EU member the new legislation provides important guidance in the development of Norwegian asylum policy.

3 The Convention on the Rights of the Child and its importance for children seeking asylum in Norway

3.1 The Convention

The CRC is the first legally binding universal instrument to incorporate the full range of human rights; civil and political rights as well as economic, social and cultural rights. The Convention was adopted by the General Assembly on November 20, 1989 and entered into force on September 2, 1990. Only two states worldwide (Somalia and the United States) have not yet ratified the CRC, making it the most widely accepted of all human rights treaties.¹⁸ The near-universal ratification of the treaty has increased its importance to refugee children and has rendered it an influential tool for advocacy. When a State is a party to the CRC but not to any refugee convention, the CRC may be used as the primary basis for protecting refugee children. The complementary relationship between the CRC and the Refugee Convention provides an optimal basis for protection for the asylum-seeking or refugee child; where the first instrument seeks to protect the rights of the child as a child, the latter serves to guard the child's rights as a refugee.¹⁹

Although the human rights standards laid out in other human rights instruments are also applicable to children, the added value of the Convention is that it affords detailed and comprehensive legal guidance on the treatment of children. An emphasis on rights rather than needs shows a commitment to seeing and respecting children as citizens who have justified claims on society. The CRC makes it clear that parents have the first responsibility to meet children's needs, but if parents cannot meet their obligations, the State must take on the responsibility.

¹⁸ Buerghenthal, Thomas (1995) p.92.

¹⁹ Bierwirth, C. Refugee Survey Quarterly 2005, Vol. 24, Issue 2: p 101.

3.2 Overview: Articles applicable to children seeking asylum

The rights of the CRC are interdependent and indivisible, meaning that we cannot ensure some rights without, or at the expense of, other rights.²⁰ The UN agencies have nonetheless identified four core articles as guiding principles of the CRC; the best interests of the child (Article 3), non-discrimination (Article 2), the survival and development of the child (Article 6) and the right to participate (Article 12). In the following, I will provide a brief overview of the Convention's provisions pertaining to refugee children.

3.2.1 Core articles

Article 2 on non-discrimination entails that states parties are obliged to provide every child within their jurisdiction with their Convention rights; "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". Equality of opportunity for all children on a state's territory is the fundamental message behind this provision. Consequently; any discrimination between Norwegian children and asylum-seeking children is specifically prohibited by the principle.

The best interests of the child. Article 3 (1) incorporates the principle that, in all actions concerning children, "the best interests of the child shall be a primary consideration". Although the "best interests" rule is fundamental in all aspects regarding children; its two main applications according to the Guidelines is government policy-making and individually-based decisions on children. The principle means that legislative bodies must consider whether laws being adopted or amended will benefit children in the best possible way, and that courts or administrative authorities settling conflicts of interest should base their decisions on what is best for the child.²¹ What in fact constitutes a given child's best interest is a matter of discretion, requiring authorities to analyze how each course of action may affect the particular child. The main debate

²⁰ "All rights are equal and no right is superior to any other;(..). Human rights are indivisible and interrelated, [and]]cannot be treated separately or in distinct categories because the enjoyment of one right usually depends on fulfillment of other rights." http://www.unicef.org/crc/index_30196.html

²¹ <http://www.unicef.org/crc/fulltext.htm#art> 12

surrounding this principle concerns what weight one should give the phrase “a primary consideration”, and how one should balance the best interest of the child against the legitimate interests of others; like parents or authorities.

Article 6 on the right to life, survival and development. This provision stipulates the obligation of governments to ensure the survival and healthy development of children "to the maximum extent possible". The Committee interprets the notion “development” in a holistic sense, embracing all of the rights in the Convention. The relevance of this article to children seeking asylum is the recognition that also displaced children are entitled to a certain standard of living, to education, basic health and welfare and to keep in touch with their cultural and linguistic background..

Article 12 on the participation and views of the child stipulates that children who are capable of forming their own views should be free to hold and express their opinions in all matters affecting them, and that their views should be given due weight "in accordance with the age and maturity of the child". The basic idea is that children have the right to be heard and to have their views taken into account, including any judicial or administrative proceedings in which they are involved; like asylum proceedings.

3.2.2 Other articles relevant to children seeking asylum

Article 22 is the only specific refugee-related provision included in any of the international human rights instruments, and applies with respect to “a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures...whether unaccompanied or accompanied by his or her parents or by another person”. The importance of this provision is that States Parties to the CRC which have not ratified 1951 Convention are legally bound to protect refugee children. Article 22 should be read in conjunction with the following articles:

Article 7 addresses the right to birth registration, a name, nationality and to know and be cared for by parents, and is an essential protection tool in relation to the issue of statelessness. However, the provision does not entail a clear right to be granted a particular citizenship, and the scope of

the obligations deriving from the article is unclear.²² A birth certificate is the first official acknowledgement of a child's existence and is crucial for claiming rights towards a state. *Article 8* addresses the right of the child to "preserve his or her identity, including nationality, name and family relations", and to have these elements traced and established in cases where this identity is unclear. *Article 9* stipulates that a child should be separated from its parents only in cases where it is in the best interests of the child. This provision may come into play during armed conflict or when the deportation of parents is the result of negative decisions on asylum. *Article 20* addresses the continuity in the upbringing of children deprived of their family environment. The right of the child to the enjoyment of the *highest attainable standard of health* pursuant to article 24 obliges States to ensure that no child is deprived of the right to access to health care services. This article may come into play upon return of seriously ill children to countries with poor health facilities. *The right to education* also for vulnerable groups is provided by *article 28*. According to Terje Einarsen, *article 37* contains a non-refoulement obligation which may act as a barrier against returning children to a country where they may be at risk for torture or other cruel, inhuman or degrading treatment.²³ Due to child considerations, it would not be natural to have as high risk-assessments for children as for adults if there is a real threat of abuse. *Article 39* on state obligation to promote recovery and rehabilitation after experience of armed conflict, torture and other forms of abuse also applies to refugee children. Together with the UNHCR Guidelines, the articles mentioned above provide a good basis for protection for asylum-seeking children.

3.3 The Right to Participation

What is in fact meant by participation? In practice, participation by children involves adults listening to children and taking their views into account in decisions affecting them. Often, this requires a shift in adult thinking; from viewing children as passive and dependent towards recognizing them as social actors in their own right. Several of the Convention's articles provide for child involvement which, when interpreted together, make a strong argument for the active participation of children.²⁴

²² Bierwirth, 108

²³ Einarsen, Terje (1998) p.28

²⁴ CRC Articles 5, 9(2), 12, 13(1), 14, 15(1), 16(1), 17, 21, 22(!), 23(1) and 29

3.3.1 Basic features

Meaningful participation has some basic features.²⁵ For example, participation is a right and not an obligation. Partaking must therefore always be voluntary and never coerced. A child's decision not to take part in an activity or a process is also a kind of participation, which should be respected by adults. Yet, not to exercise this right must be their own informed choice and not one made by parents or others. Another characteristic of participation is that it varies according to the so-called "evolving capacities" of the child; meaning that the ability of a child to take part in decisions naturally increases with age and experience. Moreover, the views of the child shall not only be heard, but should be given "due weight;" meaning that the views of the child should be able to influence decisions "in accordance with the age and maturity of the child."

3.3.2 A Democratic Right

The single most important feature by a functioning democracy is the direct or indirect participation by its citizens. UNICEF's Rakesh Rajani claims that excluding minors from participation would signify "robbing half the world's population of the opportunity to exercise their citizenship".²⁶ Children do not develop by being passive observers. Competence is obtained through experience, rather than suddenly bestowed upon someone when turning 18. Participatory experience is thus a prerequisite for democratic skills. In every society, children are among the most vulnerable groups, and their participation is an important means through which children can exercise other rights. Participation thus functions as an empowerment right; as an essential means of realizing other rights. Adults can only act to protect children if they understand what is happening in children's lives. For this right to be meaningful and effective, children must be provided with mechanisms through which they can express themselves. At the same time, the act of participation is an end in itself, and the process of partaking is therefore as important as its actual outcome.

²⁵ Rakesh, Rajani 2001:9 "The Participation Rights of Adolescents: A Strategic Approach", http://www.unicef.org/adolescence/files/Participation_Rights_of_Adolescents_Rajani_2001.pdf:

²⁶ Ibid: 11

3.3.3 Why should children be heard in asylum proceedings?

Article 12 spells out the right of children to participate in decision-making processes that may be relevant for their lives and to influence decisions taken in their regard. Also pursuant to the Public Administration Act²⁷ §17, the administrative agency has a duty to ensure that the case is clarified as thoroughly as possible before any administrative decision is made; ensuring that minors who are parties to the case have been given an opportunity to express their views.

Although none of the articles in the CRC specifically addresses the issue of asylum procedures, the second paragraph of article 12 reads: “the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child”. The procedures leading up to a decision on a family’s application on asylum is without a doubt affecting the lives of these children. Whether they have recently come to Norway or have stayed here for several years; the outcome of the procedures will be decisive for the children’s future. It is therefore crucial that asylum authorities listen to the children’s views and experiences and take them into account before making the final decision on the application. The 1994 UNHCR Guidelines confirm the importance of seeking and taking into account the views and feelings of refugee and asylum-seeking children, and enabling children to take part in decisions related to asylum proceedings.²⁸

The right of children to tell their story is absolutely necessary in order to secure an individual assessment of children’s genuine needs for protection. As of today, children are included in their parents` applications. Although adults are asked in the interview to provide information about their children, the adult’s accounts of their children’s experiences may often be inadequate, or the parents may not always put the interests of their children first. Sometimes the adults will be uninformed of the child’s experiences, be it political activity, rape or violence; or the adult may be unwilling to talk about such sensitive issues or even unaware that this may be of interest to the authorities. In some cases, the children may have witnessed much more and suffered greater psychological trauma than parents think. Many children withhold traumatic memories because

²⁷ Act of 10 February 1967 relating to procedure in cases concerning the public administration (Public Administration Act).

²⁸ Refugee Children- Guidelines on Protection and Care, UNHCR, Geneva, p.23

they do not want to add more pain to their parents' concerns. In some cases, where parents and children have experienced the same persecution, it can affect children more seriously. Cultural differences may also be a complicating factor. Where Norwegians tend to focus on the individual, people coming from collective cultures may think more in terms of the family as a whole, and may not highlight the individual experiences of each child. Hearing the child is an important means of assuring that the case of each child will be considered on its individual merits.

3.4 The Principle of the Best Interests of the Child

Another important right as regards asylum proceedings is Article 3(1). This right stipulates that in all actions concerning children, "the best interests of the child shall be a primary consideration". Article 3(1) is an "umbrella" provision which is relevant to the application of all the other articles of the Convention. In cases where different rights of the Convention are in conflict, the article may serve as a mediating principle. The provision can also be used to evaluate laws, practices and policies relating to children that are not specifically covered by provisions in the CRC,²⁹ like asylum procedures.

3.4.1 Introduction

The best interests-principle is well-known from domestic legislation and from different human rights instruments.³⁰ One of the guiding principles in the UNHCR Policy on Children states, "In all actions taken concerning refugee children, the human rights of the child, in particular his or her best interests, are to be given primary consideration".³¹

Although often quoted, the actual meaning of the principle was not thoroughly clarified during the drafting process of the CRC,³² and has since then been the object of much controversy. At the core of the debate on the interpretation of the principle has been the question of how much weight one should accord the indefinite article in the phrase "a primary consideration". Though suggestions were made in the *travaux préparatoires* that the article should refer to the child's best

²⁹ Detrick, Sharon (1999) p.92

³⁰ 1959 Declaration on the Rights of the Child, Principle 2: "*the best interests of the child shall be a paramount consideration*". See also CEDAW Articles 5 (b) and 16(1)(d).

³¹ Supra, note 19; Para. 26 (a).

³² Alston, Philip; 1994: 11

interests as ‘the primary’ or ‘the paramount’ consideration, these proposals were rejected on the grounds that the article was to have such broad application as to be used in all situations concerning children, and a certain suppleness was therefore required. It was further suggested that the child’s best interest was a subjective standard which would leave the ultimate interpretation of the principle to the judgment of the person or institution considering it.³³ Accordingly; the article’s wording has been used by the immigration authorities to allow for immigration considerations and often, these are accorded decisive weight. This reading of the article has been challenged by several organizations working with asylum-seeking children, which have strongly criticized the authorities’ assessments and return of seriously ill children.³⁴ This disagreement ought to be placed in a wider context.

Although the wording may indicate that the best interests of the child is to be one of several legitimate considerations, some researchers suggest that other concerns only in exceptional cases will justify deviating from the principle. Philip Alston claims that the reason for adopting this particular formulation was to “ensure that there is *sufficient flexibility*, at least in *certain extreme cases*, to enable the interests of those other than the child to prevail”. The child’s best interests will thus not always be the single overriding factor. Nonetheless, the drafting process implied that the competing interests that should be taken into consideration were the interests of “justice and society at large”.³⁵ Alston contends that the wording chosen imposes a burden of proof on those wanting to follow other interests than those of the child to show that, “under other circumstances, *other feasible and acceptable alternatives do not exist*”.³⁶ Furthermore, the UNHCR Guidelines provides that “When a decision is made about an individual child, then the child’s best interest must be, *at a minimum*, “a primary consideration”.³⁷

All in all, this seems to imply that the authorities’ reasoning behind the use of this article is questionable. Can one say that the whole field of asylum is to be regarded as an “extreme case”,

³³ Detrick, Sharon: A Commentary on the United Nations Convention on the Rights of the Child. The Hague : Nijhoff: 1999, p 89

³⁴ See chapter 6.2.3

³⁵ Alston, Philip (1994), p.13

³⁶ Alston, Philip:” The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” In: Alston (ed.) “The Best Interests of the Child- Reconciling Culture and Human Rights” Oxford : Clarendon Press 1994: 13.

³⁷ UNHCR Guidelines 22

and can immigration considerations be said to constitute the interests of justice and society at large? I will come back to this practice in Chapter 6.

3.4.2 How the two articles relate to each other

The CRC Committee has affirmed that article 12 is relevant to all aspects of implementation of the Convention and to the interpretation of all other articles.³⁸ I will in the following discuss how articles 3 and 12 relate to each other and interpret article 12 in light of the purpose of article 3. How does the right to participation work to strengthen the best interest of the child, and vice versa?

Only when the child itself has expressed its meanings, and these are considered in the grounds for decision, may the best interests of the child in its real sense be identified. For example, the best interest of the child must serve as the starting point for determining the need for protection. The assessment of what is in the best interest of the child requires comprehensive consideration of the child's background, particular vulnerabilities and protection needs. The principle of participation is thus a significant factor in determining the scope of a child's role in the asylum procedures.³⁹

In Norway's third report to the Committee on the Rights of the Child in 2003, the government commented the following:

“There is always emphasis on the best interests of the child in immigration cases that involve children. Many residence and work permits that are granted on “strong humanitarian grounds” are justified on the basis of consideration for the children. Nevertheless, consideration for the child/children is not always decisive, nor is it always clear what the best interests of the child are.” (Para.145).

The latter is an ambiguous statement. Part of the authorities' obligation is precisely to find out what the interests of the child are, before a decision is made. The best way to elucidate the child's interests is to have a conversation with the child, and talk to parents and experts.

³⁸ Ibid: p.145

³⁹ Bierwirth, 101-102

According to the *travaux préparatoires* of the CRC; the right to be heard could be seen as a “means by which judicial or administrative authorities could ascertain a child’s best interest in a given case”, and therefore logically follows from Article 3(1).⁴⁰ John Eekelar discusses how handling children with the objective of furthering their best interests may be reconciled with treating children as rights-holders.⁴¹ He uses the concept of “dynamic self- determinism” as a description of what the best interests-principle really means; namely, allowing scope for the child to determine what his or her interests are. As a consequence, decision-makers cannot make decisions on what constitutes the best interests of the child without considering the child’s own views. Eekelar discusses the legal status of minority as one where “adults have generalized legal power to impose a course of action on minors on the basis of their assessment of the minor’s best interests”.⁴² No other group is subjected to this kind of liability, except mentally ill or unconscious people. Eekelar claims that a modern conception of the status of minority can only be achieved through a reconciliation of the best interests-principle and children’s rights. Using the best interests-principle to justify the taking away of another Convention right can hardly be said to reconcile the two.

3.4.3 Is it always in the best interest of children to be heard?

As for adults; having to relive difficult memories can be traumatic for a child. This is an argument put forward by several people working within the administration who are opposed to hearing children in asylum proceedings.⁴³ Having to explain itself to foreign authorities with power to grant or deny the application for asylum can put the child under strain. If forced to tell a false story by its parents; the child can be put in a loyalty conflict; adding to the pressure if knowing that he or she may jeopardize the application of the family.

Because the principle of participation and the best interests-rule can be said to represent two different perspectives; a rights-based and a protectionist approach, the two rights may sometimes

⁴⁰ Detrick p 89

⁴¹ J. Eekelar, “The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self- Determinism” p 42-61, in P. Alston, “The Best Interests of the Child. Reconciling Culture and Human Rights

⁴² Eekelar, 43

⁴³ Personal comments; UDI, 22. November, 2005; 13.March, 2006.

seem to conflict.⁴⁴ A recent decision on visitation rights from the Norwegian Supreme Court illustrates this problem ⁴⁵. A man filed suit against his former live-in girlfriend because she refused him more extensive rights of contact with the children than those already established by a County Court judgment. The complaint was based on the grounds that their son had confided to his teacher that he wanted to live with the father. The case was rejected and appealed to the higher instances. Eventually, the father invoked Article 12 of the Convention before the Supreme Court; claiming that the fact that his son had not been heard constituted a procedural error. The Court stated that there was no doubt that, in principle, the child must be heard pursuant to both section 31 of the Children Act and the CRC. Nevertheless, the Court found that this view did not weigh so strongly in this case, since the issue concerned a change in the visitation arrangements in a new decision. The father's appeal was disallowed because the Court meant that it in this case was in the boy's best interests not to make a statement, as the pressure on him would be too high and put him in a conflict of loyalty towards his parents.

In the article "The best interests of the child and the right of the child to participation", member of the CRC Committee, Lucy Smith, criticizes the judgment as being in conflict with the CRC.⁴⁶ She discusses whether the right of the child to have a say constitutes an absolute, unquestionable right, or whether this right may be set aside if the principle on the best interests of the child indicates otherwise. Smith alleges that the Supreme Court in this case bases its judgment on the opinion that the right of the child to be heard is not an absolute right, but that the principle in all situations must be tried against the principle on the best interests of the child. Smith criticizes the Court's assessment that article 12 should always be interpreted in light of article 3 as being in conflict with the wording of both section 31 of the Norwegian Children Act and the CRC. Smith is concerned that the wording of the decision will potentially weaken the right of the child to be heard. According to the Implementation Handbook; "Interpretations of the best interests of the child cannot trump or override any of the other rights guaranteed by other articles in the Convention"⁴⁷. The Handbook further asserts that "States cannot quote the best interests principle

⁴⁴ Smith 2004: 1

⁴⁵ Rt.2004 p.811

⁴⁶ Lucy Smith: "Barnets beste og barnets uttalerett": Tidsskrift for familierett, arverett og barnevernrettslige spørsmål (FAB) 2004- Nr 03- 04.

⁴⁷ Implementation Handbook 1998: 37

to avoid fulfilling their obligations under article 12”,⁴⁸ thus confirming Smith`s conclusion. In sum, one may conclude that the idea of using the best interests- principle to take away other rights is at best contestable; some would even call it paternalistic.

3.5 State obligations

By ratifying the CRC, States Parties undertake the obligation of protecting and ensuring children's rights. Most frequently by using the wording “States Parties shall”; the duty to respect and fulfil the enumerated rights is specified in almost every single article of the Convention. Articles 2, 3 and 4 set out the overall obligations of the State. While Article 2 requires States to provide the Convention rights to each child within their jurisdiction without discrimination, Article 3 (2) reminds them to “undertake to ensure the child such protection and care as is necessary for his or her well-being”. Article 4 obliges governments to take “all appropriate legislative, administrative, and other measures” in order to implement all the rights in the Convention.

The Committee has issued general guidelines for initial and periodic reports, in which it asks States Parties to indicate which measures they have undertaken to further, among others; the best interests of the child, the right of the child to be heard and the situation of refugee children.⁴⁹ In the following, I will introduce some of the requirements of interest to the thesis.

Within the scope of Article 3, the Committee asks States Parties to provide information on how the best interests of the child have been given primary consideration in “[i]mmigration, asylum-seeking and refugee procedures.”⁵⁰ Further, they are requested to indicate how the principle is embedded in national legislation (para. 33) as well as to which degree it is considered by relevant authorities, courts and legislative bodies. The Committee also asks the authorities to specify measures taken to “ensure children such protection and care as is necessary for their well-being”,

⁴⁸ Ibid: p.149

⁴⁹ UN Docs. CRC/C/5 (1991); CRC/C/58 (1996). <http://www.ohchr.org/english/bodies/crc/>

⁵⁰ UNDoc.CRC/C/58(1996)Para.35 [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.58.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.58.En?Opendocument)

and how the best interests-standard is made part of the training of professionals working with children's rights.⁵¹

Regarding article 12, the Committee inquires States parties to provide information on how the right of the child to express his or her views and have those views given due weight have been incorporated in national legislation. Furthermore, States should indicate which legislative and other measures they have taken to guarantee the child the right to “express views in a manner consistent with his or her evolving capacities, including in: ... asylum-seeking procedures.”, and submit what measures have been taken to “train professionals working with children to encourage children to [express their views] and to give their views due weight”. Eventually, governments are asked to indicate how the views of the child are taken into consideration “in the legal provisions, and in policy or judicial decisions”.⁵²

Concerning Article 22, States Parties should report the “international and domestic law and procedures applicable to the child who is considered a refugee or is seeking asylum...including determining refugee status and ensuring and protecting the rights of asylum seeking and refugee children, as well as any safeguards established and remedies made available to the child”. Further, States Parties are requested to indicate “measures adopted to ensure and protect the rights of ...the child accompanied by his or her parents”, as well as to list the measures that have been adopted to secure information and training to officials working with this group. The Committee also inquires the countries to provide the “number of asylum seeking and refugee children disaggregated inter alia by age, gender, country of origin, nationality, accompanied or unaccompanied”; and would like the “number of staff handling refugee children who attended training courses to understand the [CRC] during the reporting period” to be specified. Finally, States are asked to provide information on available evaluation mechanisms to monitor the progress in the implementation, including whether they have encountered any difficulties and any priorities for the future.⁵³

⁵¹ Ibid; respectively, paras. 33, 34, 36 and 39.

⁵² Ibid; respectively, paras. 42, 43, 46 and 47.

⁵³ Ibid; respectively, paras. 119, 120, 121 and 122.

In the following chapter, I will discuss Norwegian laws and practice, later linking it to the mentioned requirements made by the Committee.

4 Norwegian Laws and Practice in the field of Asylum

4.1 Implementation of the CRC into national law

With respect to implementing international law, Norway has traditionally had a dualist⁵⁴ system. Following recommendations from the UN, Norway incorporated the CRC into national legislation by amendment to section 2 of the Norwegian Human Rights Act of 1999, taking effect from 1 October 2003⁵⁵. The purpose of the Act was according to section 1 to strengthen the status of human rights in Norwegian law. As a result of the amendment, the Convention as a whole was made Norwegian law, and will in conflicting situations have superiority to national legislation.⁵⁶

4.1.1 Implications

What is the significance of implementing the CRC? According to Kirsten Sandberg, the implementation has increased the importance of the Convention as a source of law, and now offers almost unlimited possibilities for using it as a legal argument.⁵⁷ Turning the CRC into Norwegian law does not only have legal implications, but also has political and pedagogical consequences. The political importance is demonstrated both in the national and in the international context. Sandberg observes that the increased weight of the Convention as a legal source implies that generally, one will to a greater extent have to take children's interests and

⁵⁴ It is up to each State to decide how its international legal obligations are to be carried out in internal law. In some legal systems, called monist systems; international law has direct domestic applicability. In dualist systems, like Norway, international conventions have to be implemented, transformed or regarded as in accordance with national laws in order for them to be applicable as domestic law. NOU 2004:20, p 73

⁵⁵ Amendment (Endringslov) no 86 of 1 August 2003.

⁵⁶ Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act) Article 3 stipulates that: "The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them".

⁵⁷ Sandberg, Kirsten. *Inkorporeringen av FNs barnekonvensjon i norsk rett*. In: Kritisk Juss. Årg. 30, no 4 (2004), p 316-317.

views into account in all cases involving children. Furthermore, the fact that Norway has implemented the CRC into its legal framework as a whole sends important signals to the international community. The implementation also has great pedagogical significance, because it makes the convention visible as a whole; and thereby strengthens the CRC's position in the public sphere. Although organizations working with children have long made use of the Convention's provisions, the implementation will make their arguments difficult for the authorities to ignore. The courts and the administration will have to take the provisions of the Convention into consideration, and the legal content and implications of the CRC in a Norwegian context will thereby be clarified. Sandberg concludes by saying that the main challenges with respect to the fulfilment of children's rights in children in Norway rarely is due to an insufficient legal framework, but rather that in some areas, practice must change.⁵⁸

4.1.2 Politics and Law: A mutually dependent relationship

The implementation of the international human rights conventions into a Norwegian Human Rights Act was a contentious issue. The process of which interests and claims are transformed into legally enforceable rights (in Norwegian called "rettsliggjøring"), has by some been described as being a threat to democracy. The Power and Democracy-report⁵⁹ held that international conventions and treaties increasingly limit the Norwegian legislative power by binding political bodies by laws they cannot control, whereas Norwegian Courts through the interpretation of laws have reinforced their position. The separation between legislative powers and the judicial branch thereby becomes blurred. In Norway, the Supreme Court is the highest instance for statutory interpretation. However, as decisions given by the European Court of Human Rights are now legally binding for Norway, some jurisdiction has been moved from domestic to international courts. Inger-Johanne Sand criticizes the Power Report's negative view of rights as biased and holds that "rettsliggjøring" is a premise for, instead of threat to, democracy. A central feature of a liberal democracy is that politics, decision-making and legal procedures are complementing and mutually dependent on each other. "Law and politics have been the two communicative systems in society which have attended to, developed institutions

⁵⁸ Sandberg, 328.

⁵⁹ NOU 2003:19 (2003) Report on Power and Democracy (Makt- og Demokratiutredningen) chapter 6.2- 6.4. http://odin.dep.no/fad/norsk/dok/andre_dok/nou/002001-020015/hov006-bu.html

for and operationalized this interplay between democracy and human rights”.⁶⁰ While politics attends to active and dynamic discussion, the law stabilizes and implements the decisions. Both institutions are necessary prerequisites for a functioning democracy.

4.2 Main legal framework: The Immigration Act and Immigration Regulations

The 1988 Immigration Act⁶¹ and the 1990 Immigration Regulations⁶² are the most significant national laws relating to the status of asylum seekers. The provisions of the Immigration Act provide the framework for the entry and stay of foreign nationals in Norway, while the Immigration Regulations indicate in more detail how provisions under the Immigration Act are to be enforced. In addition, the Directorate of Immigration issues circular letters of importance to the interpretation of these instruments. The rules of procedure following from the Public Administration Act are also applied when assessing asylum cases.⁶³ The general implementation clause in the Act's § 4 states that the law shall be applied in accordance with international rules by which Norway is bound, when these are intended to strengthen the position of a foreign national.

4.2.1 New Immigration Act

In December 2001, a committee was set up to revise the Immigration Act in order to make it correspond better with the changed realities of immigration.⁶⁴ Taking the hearing statements of organizations and authorities into consideration; the Committee handed in its final draft in October 2004. The draft contains a thorough discussion of the immigration- and asylum system, as well as proposal for a new Immigration Act.⁶⁵ On the basis of this draft, the government will

⁶⁰ Sand, Inger-Johanne (2005),p.18

⁶¹ Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and their presence in the Realm (Immigration Act), 24 June 1988 No. 64.

⁶² Regulations Concerning the Entry of Foreign Nationals into the Kingdom of Norway and their presence in the Realm (Immigration Regulations).

⁶³ UDI: Barns rettslige stilling i Norge. <http://www.udi.no/templates/Page.aspx?id=5149>

⁶⁴ Royal Decree of 14. December 2001. A Norwegian Public Inquiry (NOU) is made when the government or the ministries would like to investigate societal conditions. The preparation of a NOU often leads to the amendment of a law or to a new law.

⁶⁵ NOU 2004:20 Ny Utlendingslov

present their proposal by the end of this year, and the new Act will most probably become operative on 1 January 2008.

Part of the Committee's mandate consisted of considering what consequences the implementation of the CRC will have for the Act. The Committee did not find it "necessary nor expedient" to include a reference to the CRC in the Act; but proposed a reference to the principle on the best interests of the child as a primary consideration in cases involving e.g. compassionate grounds.⁶⁶ The proposal has been criticized by several organizations for not taking the individual situation of children in asylum proceedings seriously. The new Immigration Act is an important event for organizations working with asylum-seeking children, because many issues in this regard have been postponed until the drafting of the new law. A thorough revision of this Act happens very infrequently and could therefore prove to be an opportunity to make a lasting change for the situation of children.

4.3 The Right of Children to Co-determination in Norwegian Law

The right of children to express their views and have their views be given weight in cases which concern them was a well-known principle in Norwegian policies on children also before the implementation of the CRC.⁶⁷ Some examples of laws now listing the right of the child to participation are the Children Act,⁶⁸ the Child Welfare Services Act,⁶⁹ the Education Act⁷⁰ and the Patients' Rights Act⁷¹. However; also where the right to participation is not explicitly laid out in law, the provision in the Convention is applicable.

In individual decisions, the Public Administration Act's section 17 stipulates that the agency concerned shall make sure that the case is clarified as thoroughly as possible before any administrative decision is made, and "ensure that minors who are parties to the case have been given an opportunity to express their views insofar as they are capable of forming their own

⁶⁶ Ibid: 92-93

⁶⁷ Scheie, Martine (2005), p.18 FNs Barnekonvensjon: Fra visjon til kommunal virkelighet.[Oslo]: Universitetet i Oslo, Norsk senter for menneskerettigheter. 2005.

⁶⁸ Act No. 7; 8 April 1981 relating to Children and Parents, §31.

⁶⁹ Act of 11 June 1992 No. 100 relating to Child Welfare Services. §17.

⁷⁰ Act of 17 July 1998 No 61 relating to Primary and Secondary Education. §§9a-5 and 9a-6.

⁷¹ Act of 7 February 1999 No.63 on Patient's Rights. §§3-1 and 4-4.

opinions about the case in question.” Another relevant law as concerns children in asylum-proceedings is the Children Act. Section 31 proclaims the child’s right to co-determination. Its second paragraph reads as follows:

“...When the child has reached the age of 7, he or she shall be allowed to state his or her opinion before decisions are made on personal matters on his or her behalf...When the child has reached the age of 12, great weight shall be attached to the child's wishes.” (my translation)

The provision was amended by law in June 2003; lowering the age limit for hearing children from 12 to 7 years. Although the Convention does not set a fixed age limit on the right to be heard, Norwegian law now provide children over the age of 7 with the absolute right of participation. Children younger than 7 who are able to form their own views should also be given the opportunity to express themselves.⁷² This follows from the first paragraph of section 31 which corresponds directly to the right to participation of the CRC. In the following chapter, I will assess whether these amendments should have implications for the interpretation of the provision on hearing the child in the Immigration Regulations.

4.4 Asylum Policy

In Norway, as in most European countries, asylum policy is politically a very disputed and controversial issue. Individual cases get a lot of attention in the media, and politicians are often asked to comment on decisions made by the administration. Whereas some people and organizations criticize the authorities for being too cold and cynical, others accuse the same system for being naïve and much too soft on asylum-seekers. Which position a person takes in this debate often depends on the person’s political affiliation.

4.4.1 The Welfare System: A Social Contract

Compared to most countries, Norway has a generous welfare policy. To put it simply; the system is based on heavy taxation of citizens, who in return trust the state to provide social benefits like free education, health care and unemployment benefits. The concept “relative deprivation” is

⁷² Proposition from the Odelsting. (JD- Ot.prp. nr. 45) 2002-2003, section 5.2.1 (28.02.2006)

discussed by Hernes and Knudsen⁷³ in relation to reactions of citizens who perceive it as unfair that 'newcomers', like refugees, who have not contributed to the public welfare system should nonetheless receive benefits. Even though providing food and housing to refugees will not impact in the benefits provided to Norwegians, some people may feel "relatively deprived" of their share of the total they have contributed to. This theory may explain both negative reactions towards refugees and immigrants, and scepticism towards the system and the government. The last decade has witnessed a steady increase of voters to the Progress Party, a party openly voicing the scepticism many Norwegians feel towards immigrants and refugees. Given the nature of politics, the sitting government has to pay attention to its voters when developing e.g. asylum policies, and balance these with Norway's international obligations.

Grete Brochmann observes that "the universalistic welfare model, basically being an inclusive yet limited asset, at the same time necessitates selection or delimitation[of immigrants]." ⁷⁴ She sees a tendency where, due to the international character of migration movements, each European state has to consider the policies of other governments. Each state is afraid of the 'magnet effect', which usually results in the policy of the most restrictive state setting the tone. Brochmann finds Norway to be "caught in the squeeze between humanitarian values and obligations on the one hand, and the need for *realpolitik* on the other".⁷⁵

4.4.2 "Immigration policy considerations"

The immigration authorities are required to balance the rights and needs of individuals with the interests of the State. The frequent references to immigration policy considerations is grounded in the Immigration Act's § 2. Although the purpose of the Act partly is to "provide the basis for protection against persecution for refugees and other foreign nationals who are being persecuted," another aim is to control the entry and exit of foreign nationals and their presence in the country "in accordance with Norwegian immigration policy"(emphasis added). The possibilities of the government to instruct and review decisions made by the administration is regulated by the Act's § 38. The ministry cannot give instructions on decisions in single cases, and neither may it

⁷³ Hernes, Gudmund (1994) pp.319-335

⁷⁴ Brochmann, Grete (1999) p.230

⁷⁵ Ibid, p.231

instruct UNE on the interpretation of laws or its use of discretion. The ministry may however give guidelines on the general direction of immigration. The recent 'MUF-case' in UDI (below) is an example of the sensitive nature of immigration policy; as well as the sometimes complicated relationship between the government issuing regulations and the administration exercising them.⁷⁶

4.4.3 The Graver-report

When assessing asylum applications, the case worker needs to balance individual guarantees of due process protection against the society's need for regulation and control. In this respect, the asylum agencies are responsible towards the political authorities. The Graver-report based on the inquiry of UDI's alleged "liberal practice" when treating the MUF-applications was launched 22.05.2006.⁷⁷ The report criticizes UDI's practice as being partly contrary to the Immigration Act's §8.2 and former Minister Erna Solberg's instructions. The report was prepared solely by jurists, and has subsequently been criticized for being one-sided and without consideration for the problem's political nature, which is an innate part of asylum policy.

In a newspaper chronicle, human rights adviser Gro Hillestad Thune writes that "in a human rights perspective, the disquieting factor is that the report practically gives the Immigration Act's §8.2, the so-called humanitarian paragraph, its deathblow..."⁷⁸ She notes that the report contains no reference to refugee law or human rights, and that it contributes to a general climate within Norwegian asylum policy where showing a minimum of compassion is reprehensible. Thune emphasizes that the Ministry of Justice and jurists working with asylum and refugee law find UDI's practice to have been within the scope of the law, and concludes that UDI demonstrated decency in accordance with the law and with Norway's international obligations. Several law professors at the University of Oslo have lately accused Solberg's instruction as being against the law.⁷⁹

⁷⁶ The so-called MUF's (Temporary Residence Without possibility of Family Reunion) were a group of Northern Iraqis who were given work permit by the UDI against the instructions from the ministry, causing political debate on the relationship between politicians and bureaucrats. <http://www.udi.no/templates/Tema.aspx?id=7236>

⁷⁷ http://www.udi.no/upload/MUF/Rapporten_del%20I.pdf

⁷⁸ Thune, Gro Hillestad. Aftenposten, 28.05.2006

⁷⁹ Dagsavisen 01.06.2006.

The last word has clearly not been said in this debate, and it will be interesting to see which consequences the MUF-case will have for the direction of the Norwegian asylum policy.

4.4.4 A comprehensive approach to immigration

The White Paper *On Immigration Policy* introduced the notion that Norwegian immigration control was to include preventive measures in order to limit migration to Norway. The paper emphasized that “Norway cannot solve the refugee and migration problems of the world by letting everyone who desires to settle in the country, do so,”⁸⁰ and suggested increased international involvement as a kind of compensation for restrictive entry regulations.⁸¹ The White Paper introduced a “comprehensive approach” to immigration, which included development aid, foreign policy and peaceful conflict resolution through the UN as important elements of Norwegian immigration policy. The central aim of Norway were to receive “the people in real need for protection”;⁸² implicitly differentiating between `economic` and `real` refugees. The subsequent White Paper *On Refugee Policy*⁸³ re-emphasized the holistic approach with focus on root causes, concentration on local areas and temporary protection aiming at repatriation.

4.4.5 The Red-Green Government

Following the September 2005 elections, Norway got a new government consisting of a coalition by the Labour Party, the Socialist Left Party and the Centre Party. In its governmental platform, the government proposes to lead an immigration-and refugee-policy which is to be “humane, based on solidarity and procedural guarantees”.⁸⁴ The government emphasizes Norway’s international and moral responsibility for people in need of protection and pledges that it to a greater extent will have regard for UNHCR recommendations. The government further states that

⁸⁰ Stortingsmld. 1987-88:39 p.8

⁸¹ Brochmann, p.213

⁸² Supra note 82

⁸³ 1994-95:17

⁸⁴ The Soria Moria Declaration (2005) chapter 17 (My translation)
<http://www.dna.no/index.gan?id=46458&subid=0>

it will see to the “correspondence between the CRC and the immigration administration;”⁸⁵ indicating that the coalition at this point finds the two to be inconsistent. On my question about the content of this statement, State Secretary of the Ministry of Labour and Social Inclusion (AID), Libe Rieber-Mohn responded that what the government meant by this is that

“one should ensure that the decisions that are made and the procedures which are followed in the department of immigration are in conformity with the Convention on the Rights of the Child. This implies that one has to consider the present situation and if there are procedures which are in violation of the Convention, one will have to consider measures which could secure a greater degree of correspondence with the CRC”.⁸⁶

On my inquiry of concrete measures taken to attain this purpose, the Rieber-Mohn explains that the Ministry is currently assessing different measures and that the government “in connection with the preparation of a new Immigration Act is considering different ways of making children’s rights visible.”

In sum, any promises from the government seem to be rather vague at this point. It is nonetheless positive that the CRC’s role in the field of immigration is put on the government’s agenda, and one can hope that continued pressure from organizations and others working with children’s rights will succeed in getting a more child-friendly Act.

4.5 The Asylum Authorities; INN, UDI and UNE

Since 1 January, 2006 the Department of Migration (INN) has been responsible for the development and coordination of Norwegian refugee and immigration policies. The Directorate of Immigration (UDI) was set up in 1988 and is the official body which makes the first decision in an asylum case; the so-called first-instance function. The Immigration Appeals Board (UNE) was established on January 1st, 2001 as an appellate authority for decisions made by the UDI. While UDI is an administrative body, UNE is intended to be an objective, politically independent and court-like body. Nevertheless, UNE will to some extent have to follow instructions on

⁸⁵ Ibid. (my translation)

⁸⁶ Personal e-mail from Libe Rieber-Mohn, 12 May 2006.

immigration policy considerations. In most instances, the Appeals Board is the final instance of appeal. The main responsibility for establishing practice, therefore, lies with the Board.

4.6 Administrative proceedings in asylum cases concerning children

In Norway, a person may be granted asylum if he or she has a well-founded fear of persecution on the grounds of race, religion, membership of a particular social group or any other reason stated in Article 1A of the 1951 Convention.⁸⁷ Until recently, Norway was often criticized for its strict interpretation of the definition, because it made only a small number of people eligible for asylum.⁸⁸ The right is grounded in Article 17 of the Immigration Act; stipulating that “Any refugee who is in the realm or at the Norwegian border has on application the right to asylum (refuge) in the realm”. By persecution, UDI now refers to “grave human rights violations or other serious encroachments” and by “well-founded fear” that there shall be a substantial risk of future persecution in the case of return.⁸⁹ Persecution by the authorities of the country of origin, and others, for example by armed groups or family members, can constitute grounds for asylum. The condition for seeking asylum is that the government of the home country cannot provide effective protection. The decision on asylum is made on the basis of the asylum interview, any evidence the asylum-seeker can come up with to verify his or her story as well as country information provided by NGOs and the special country information unit used by the authorities; Landinfo.⁹⁰ If the asylum-seeker is not found eligible for refugee status, but still has compelling reasons for why he or she should be allowed to stay, the person may be granted, respectively, a residence permit on protection grounds or a residence permit on humanitarian grounds.⁹¹ The main

⁸⁷ The Immigration Act's Article 16 refers to the definition of refugee laid out in the 1951 Convention and its 1967 Protocol.

⁸⁸ The majority of refugees and asylum seekers who were allowed to stay in Norway, were given residence permits on humanitarian grounds. In 1998, the Norwegian government introduced more liberal guidelines for granting asylum, recognizing victims of gender or sexual persecution, as well as victims of persecution by non-state actors, as Convention refugees. <http://www.nrc.no/OnAlert/4.htm>

⁸⁹ (my translation) http://www.udi.no/upload/Publikasjoner/Pressehåndbok_0602_net.pdf; p 10

⁹⁰ Landinfo collects and analyses information on social conditions and human rights for use by the Immigration Authorities. According to an e-mail from Dag Petterson (03.05.2006) the unit has no child-specific information from different countries, but collects information related to the situation of children when child-cases are being handled.

⁹¹ This is in EU terminology also called “subsidiary protection”, while the UNHCR uses the term “complementary protection”. The terms describe practices that have evolved in industrialised states to provide protection from return for persons considered outside the scope of the Refugee Convention.

difference between a grant of asylum and residence permit on other protection grounds is that a recognized refugee get extended rights, for example, with respect to family reunion, travel documents and economic support, and that there is also a certain higher status in the official recognition of former persecution.

The report “Study of the Grey Zone between Asylum and Humanitarian Protection in Norwegian Law and Practice” by Cecilia Baillet is a study of the handling of asylum cases in Norway. Baillet explores the `grey area` between the grant of asylum and the grant of humanitarian protection; criticizing the Norwegian practice of granting humanitarian protection where in her opinion, refugee status should have been given.⁹²

The Immigration Regulations Article 54(4) stipulates that children accompanying their parents who apply for asylum will be registered in the application of their mother or father. If the adults are granted a residence permit in Norway, their children under the age of 18 will also be granted stay. In general, the same principle applies if the parents' applications are rejected.

4.6.1 Other Grounds for Protection: Equity

The Immigration Act § 15 is a guarantee against non-refoulement, and prohibits Norway to return an asylum-seeker to an area where he or she will not be secure. Residence on humanitarian grounds is given pursuant to this principle if general unrest makes it unsafe for a person to return to his or her home country. If the authorities do not find the asylum seeker eligible for asylum or protection based on the non-refoulement-guarantee; § 15 further requires the authorities to assess whether there are grounds for granting other protection, pursuant to the second paragraph of §8. This is further described in § 21 of the Regulations, stipulating that leave may be granted where “other strong humanitarian considerations so indicate or the foreign national has a particular attachment to Norway.”⁹³ Protection on account of compassionate grounds, “sterke menneskelige hensyn”; is a common expression for a permit granted to asylum seekers where compelling reasons indicate that the person in question should stay in the country; like serious health

⁹² Baillet, Cecilia p.12

¹⁰⁹ This is in EU terminology also called “subsidiary protection”, while the UNHCR uses the term “complementary protection”. The terms describe practices of providing protection from return for persons considered outside the scope of the Refugee Convention.

conditions or the situation of children. An assessment of those other grounds or considerations is made with the exercise of discretion based on equity; in Norwegian called “reelle hensyn”. The criteria can be somewhat vague, requiring the case worker to balance the interests of the individual against the interests of the state. The interests of children thus have to be weighed against other considerations. Often, the interests of the State concur with the politically set premise that immigration to Norway should be regulated and controlled, commonly referred to as “innvandringspolitiske hensyn”; i.e. immigration policy considerations. I will return to this discussion in chapter 6.2.1.

5 Procedures of Hearing Children

5.1 Concerns of the CRC Committee

The consideration of the third Norwegian periodic report came out in June 2005 and as in both of the previous reports, the conditions of asylum-seeking children was a central concern of the Committee. Norway's insufficient practice of interviewing children in asylum procedures was first questioned by the Committee in 1994. The issue of participation was particularly addressed by the Committee in the 2000 report, where it expressed concern that the provisions and principles of the Convention were not being entirely respected with regard to asylum-seeking children. "Specifically, the Committee is concerned that child applicants for asylum are provided with insufficient opportunities to participate in their application process and that their views are insufficiently taken into consideration..." Furthermore, the Committee recommended Norway to review its procedures for considering applications for asylum from children, whether accompanied or unaccompanied, "to ensure that children are provided with sufficient opportunities to participate in the proceedings and to express their concerns."⁹⁴ The Committee also expressed its concern over delays in the asylum procedures, and recommended that Norway consider the principles of the Convention when reviewing the procedures. In its 2003 report, Norway responded that from 1 July 2000, a new system for interviewing children in asylum cases was introduced, and that generally, all accompanying children should be interviewed.⁹⁵

In its supplementary report to the Committee in 2003, the member organisations of the Forum for the CRC (FFB)⁹⁶ contradict the statements made by the official report. FFB contended that asylum-seeking children were only to a very limited extent heard in connection with immigration

⁹⁴ CRC Recommendations 2000 <http://www.ohchr.org/english/bodies/crc/crcs39.htm>

⁹⁵ Third Report to the CRC Committee (2003), para.146.

⁹⁶ The Forum for the CRC consists of approximately 60 organizations and institutions working with child rights in Norway. FFB report to the Committee 2003 can be found at http://www.lnu.no/nedlast/0406301339102_Rapport_engelsk_NY.pdf : 27-29

cases, and that Norway in this field contravened Article 12. However, in the 2005 recommendations from the Committee, the issue of participation in asylum proceedings was not discussed. Norway was complimented on its changes in general children's legislation which strengthen the right of children to be heard. The Committee nonetheless noted that "the national legislation in some areas, such as immigration...require further attention in order to ensure that the actual implementation is in full conformity with the principles and provisions of the Convention".⁹⁷ In the following, I would like to investigate if the hearing of children to a greater extent is being fulfilled in 2006. Although it is good guidelines and intentions seem to be in place, I would like to explore the actual practice in the asylum administration. What are the main problems and obstacles identified by authorities and organizations to hearing children in the asylum procedures?

5.2 Procedures

5.2.1 UDI

In July, 2002, the responsibility for interviewing asylum seekers was transferred from the police to UDI. A part of the aim was to ensure that the interview take place in a more civilian environment, which is particularly important with respect to hearing children. Until recently, the authorities had no routine of regularly hearing children accompanying their parents. From July, 2000, a new regulation on this issue came into force, and in December 2003 a new provision was added to the Immigration Regulations regarding the interview of children.⁹⁸ Section 55a (3) stipulates that in the interview with the parents;

"the total life situation of any accompanying child shall be elucidated... In this connection a conversation shall be conducted with the child unless it is deemed clearly unnecessary or the parents object to this. At least one of the parents must be present during the conversation".

⁹⁷ CRC Recommendations 2005 paras. 6 and 7. <http://www.ohchr.org/english/bodies/crc/crcs39.htm>

⁹⁸ Ministry of Municipal and Regional Affairs. Report no 17 (2000-2001) to the Storting on the Asylum- and Refugee policies in Norway. <http://odin.dep.no/krd/norsk/dok/regpubl/stmeld/016001-040005/hov004-bn.html>

In practice, however, UDI put the hearing of children in system as late as of May 2005, and then only children over the age of 12 in the 7-weeks procedure.⁹⁹ Since March 2006, the UDI conducts conversations with all children over 12, as long as it is not deemed clearly unnecessary and their parents agree to it.¹⁰⁰ As “clearly unnecessary” is meant for example the questioning of mentally disabled children.

Conversations are conducted by a special interview unit, assisted by a child expert. The conversation with children is less formal than the adult asylum interview. According to a communication provided by the unit, the purpose of the conversation is to “assess the child’s understanding of its own situation, the history of the child and the child’s wishes for the future.”¹⁰¹ The child expert emphasized that the intention is not for the conversation to be therapeutic, but rather, to constitute an elucidation of the child’s situation. The conversation should not be marked by being a questioning of the child. A narrative method is employed, where the child is encouraged to tell freely about his or her own experiences. The UDI stresses that the purpose of the conversation under no circumstances should be to control the information that the parents have given. If the child during a conversation indicates or contradicts the information provided by his or her parents, the interviewer should change the subject and not follow up this information. On the other hand; if anything the child informs indicates that he or she may have an independent basis for asylum; this is to be followed up with questions. In any case, one of the parents shall always be present during the conversation, in addition to a translator. A conversation lasts about an hour.

5.2.2 UNE

The starting point for UNE’s assessment is the information provided in UDI’s assessment by the child, his or her family members and the case worker. Unless there are circumstances indicating the need for further clarification, UNE usually will not make any closer investigations. However; if the secretariat or board leader do not find the case to be sufficiently informed, for example with

⁹⁹ UDI operates with 48-hours, 3 weeks and 7 weeks-procedures in assessing applications on asylum.

¹⁰⁰ Personal comment, UDI: 13.03.2006. In May, 2005, a UDI working group on the hearing of children was established, as well as a pilot project encompassing children over 12 years in the 7-weeks procedure.

¹⁰¹ Communication provided by the UDI interview unit, 13.03.2006.

regard to the health situation of the child, further information is to be collected in writing from the family's legal representative. If additional information is needed; i.a, regarding the child's experiences in the country of origin or in Norway, it may prove necessary to hear the child. The board leader decides whether a child should have the opportunity to meet in person at a board meeting. The board leader exercises his or her discretion accorded by the Immigration Act section 38b, and evaluates the following factors: The child's age (5.1), the child's maturity and development (5.2), the parents' stance (5.3) and the child's own opinion (5.4).¹⁰² The older the child is, the more important will it be that the child meets in person. The main rule is that children younger than 12 are not asked to participate, unless it is required by the maturity of the child or the importance of the situation. The parents take care of the child's interests as its guardians, and a conversation is therefore not to be held with the child if the parents disagree. Most importantly, the child's own wishes are to be respected.

The child meets together with the parents and the family's legal representative. According to the guidelines, the purpose of the conversation is to "enlighten the case in the best possible manner with respect to circumstances concerning the child".¹⁰³ The child is to be informed that he or she is not required to answer questions if the child does not so wish. The topic of the conversation could be anything the child would like to talk about, but special care should be taken by sensitive issues, like witnessed assaults against the parents. The child is not to be put under pressure, and the conversation is not to be used as a control of the parents' information. The board leader should be attentive to cultural differences, and to the fact that children may have problems of noting time, places and events.

5.3 Implications and Dilemmas arising from Interviewing Children

The asylum authorities addressed several problems and ethical dilemmas inherent in the process of carrying out child conversations. My respondents told me that there is reluctance within UDI to carrying out conversations with children. They identified mainly three reasons for this. First; many case workers or interviewers find talking to children difficult, and feel personally

¹⁰² Interne retningslinjer av 04.02.03 om: *Barn i UNEs saker*. Updated 21.11.2005. http://www.une.no/c2002/UNE_no/templates/applications/internet/dokumenter/norsk 29.04.2006

¹⁰³ Ibid: P 7 (my translation)

uncomfortable in the interview setting. Secondly; using substantial resources on talking to a child about his or her village in Chechnya, or about the child's class mates in Norway, is perceived as being rather futile compared to the regular confrontational adult interviews aimed at verification. Thirdly; many case workers do not see the benefit of interviewing children whose parents do not have grounds for asylum.

Also employees who are generally positive to child conversations mention difficult dilemmas. Generally, communicating with children with the aim of achieving certain information can be challenging. How does one communicate with a child who is not used being talked to by adults, and who speaks a different language? Is talking to authorities empowered to determine the outcome of a family's application too great a responsibility for a child? How does one determine what is in a child's best interest? Should parents be able to object to the hearing of their children, or be present at interviews? What if the child is pressured by his or her parents to support a false story? How should the authorities react if abuse by parents is discovered through the conversations? Although this is not very likely to be discovered through the interview, cases involving abuse raise difficult questions. The recent cases of the so-called apathetic children in Sweden proved that there are people who are so desperate to stay that they are willing to inflict health problems upon their own children.¹⁰⁴ The authorities are hence confronted with the dilemma of letting the child(ren) stay while their parents are evicted. Separating children and parents is a very drastic measure which would have to be balanced against other Convention principles, like the principle of family unity. There have further been cases where people have brought children not related to them in order to improve their own chances of getting residence permits, or who later smuggle the children to other countries for the cause of child labour or prostitution.

Although this naturally is far from the case for most families coming to Norway, stories like these increase scepticism among case workers and the public in general. Nonetheless; these arguments

¹⁰⁴ In Sweden, a phenomena of apathetic children at reception centres caused widespread concern among health personnel and at the political level. Hundreds of children were apathetic for apparently no reason, and several got residence permits on compassionate grounds. No other countries had this problem. In November, 2005, a group of people were arrested for having drugged down their children or denied them proper nutrition.
http://www.udi.no/upload/Asylmottak/infoskriv_barnimottak1205.pdf

show even more the importance of carrying through conversations and trying to bring cases of abuse to light, in order to help children who suffer.

5.4 Concerns of organizations working with children

Comments from organizations working with children imply that there is still some way to go before the CRC will take precedent in the field of asylum and immigration. Although The Ombudsman for Children's Office has also actively expressed its concern about the situation for asylum-seeking children; I have due to thesis requirements had to limit my scope to three organizations. Save the Children, NOAS and PRESS are all currently promoting the individual procedural rights for children seeking asylum in Norway.

5.4.1 Introduction

In a letter to AID in October, 2005, Save the Children and the Norwegian Organization for Asylum Seekers (NOAS) requested AID's Minister, Bjarne Håkon Hanssen, to elucidate how Norwegian asylum authorities are observing the CRC. They also asked for a clarification of how the government intends to follow up its statement of ensuring correspondence between the CRC and the field of asylum. Two years after the implementation of the CRC the organizations express "grave concern" with respect to the manner in which the rights of asylum seeking children are observed. In particular, the organizations criticize the insufficient opportunities of children to participate in asylum proceedings and a lack of respect for the best interests-principle.¹⁰⁵ In their view, "several fundamental reforms" are needed in order to fulfil children's rights in the asylum process.¹⁰⁶ The letter of response from Hansen four months later was short and merely remarked that the ministry is looking into the issue;

"The government is intent on the question that all children should have their own as well as their families' need for protection evaluated in a secure manner, and that children should be secured a

¹⁰⁵ Save the Children news 31.10.2005 (my translation). "Behov for kartlegging".

http://www.reddbarna.no/default.asp?V_ITEM_ID=8186

¹⁰⁶ Letter to Bjarne Håkon Hanssen, 31.10.2006. "Kartlegging av praktiseringen av barns rettigheter i asylsaksgangen"

best possible stay in Norway pending the proceedings in UDI and UNE. This appears from the Soria Moria Declaration, and this will be followed up by the government”.¹⁰⁷

Save the Children Norway

Legal adviser Janne Raanes raises several questions to the authorities` current practice of hearing children.¹⁰⁸ While complimenting the Norwegian government for being at the forefront of giving children participation rights, she is critical to the motives and political will of actually taking the views of asylum-seeking children into account when making decisions. The adviser asserts that although the asylum authorities show consideration towards children, children are yet to be seen as individual holders of rights. The agencies are thus not preoccupied with investigating the individual protection needs of children, but tend to focus on other situations which could potentially merit stay on humanitarian grounds. Raanes emphasizes that giving children`s opinions due weight implies having political will to go all the way; even though potentially this would mean giving parents residence permit on the basis of the child`s own grounds for protection. This way of thinking turns the current practice of the agencies upside-down. Children may nonetheless have own grounds for asylum based on child-specific persecution. Although Raanes stresses that these instances are rare, there must nonetheless be attention and competence to handle such cases when they occur. Save the Children advocates the use by asylum authorities of a broader interpretation of the definition of a refugee, and emphasizes that any risk-assessment must be based on thorough child-specific country information which could be balanced against the information provided by the child. In order to get a realistic individual assessment, children should get their own files. Other problems raised by the organization is the issue of standard answers and the lack of assessment and grounds provided when using the best interests of the child in decisions; causing the concept to become less than flowery rhetoric. Further, the organization expresses disappointment over the effect so far of implementing the CRC; as being more in theory than in practice. Raanes points out that there is need for drawing a line between the Convention, Norwegian laws on children and the Immigration Act and for making guidelines on the balancing of rights in order to change the practice of the administration. Finally, Save the

¹⁰⁷ (my translation) Letter from Bjarne Håkon Hanssen,

¹⁰⁸ Personal comment, 24.04.2006

Children emphasizes that Norwegian authorities cannot take a light-version of the CRC merely because the people involved are foreigners.

PRESS (Save the Children Youth)

PRESS is currently conducting a campaign aiming at changing the new Immigration Act in order to advance individual treatment of children in asylum proceedings. The organization's leader Heidi B. Grande points out that structural changes in the legal framework is required in order to promote a change of attitude towards children in the administration.¹⁰⁹ Grande affirms the importance of hearing children in order to secure individual treatment in the asylum process, and claims that not hearing children under the age of 12 is a violation of the CRC. When the authorities can accommodate for 7-year old Norwegian children in custody-or child care-cases to be heard, the same opportunity should be provided foreign children residing in Norway. The PRESS leader mentions the age difference as just another area where the authorities discriminate towards asylum-seeking children, and calls for common legal policies where children are seen as children, regardless of national background. The experiences with interviewing unaccompanied minors should provide a good background for hearing children accompanying their parents. Moreover, Grande criticizes the current practice of "cutting and pasting" the reference to the best interests-principle into decisions, and emphasizes that well-grounded decisions constitute an important part of individual treatment. PRESS expresses disappointment over the procrastination of going through the field of asylum in relation to the CRC and criticises the new government for competing with the Progress Party in appearing strict on immigration.

NOAS

Rune B. Steen in NOAS asserts that children in the asylum process have a rather weak protection of the law.¹¹⁰ The organization handles complaints on rejections from UNE, and Steen claims that children today are partly invisible in decisions. As an example, he mentions that negative decisions by UNE on women from countries like Ethiopia and Eritrea, where common practice is that children are imprisoned with their mothers, only assess the mother's risk of being imprisoned again upon return, without pointing out that the risk includes the child. NOAS is also critical to

¹⁰⁹ Personal comment; 07.04.2006.

¹¹⁰ Personal comment, 05.04.2006

the use of standardised decisions and has proposed a special obligation to explicitly state the grounds for rejection in decisions concerning children, in order to secure openness and possibilities for verification (“etterprøvbarhet”). Steen asserts that the closed and “sometimes arbitrary” nature of the administrative process does not reflect the far-reaching consequences for the individual, which can be far more serious than those made in an open criminal process. In this respect, Steen identifies the practice of sole board leader decisions as the main problem. NOAS finds clear differences among the board leaders with respect to their thoroughness when writing decisions. Some decisions are missing verifiable grounds, which make them hard for lawyers to appeal. Steen further criticizes Norway’s return of seriously ill children to Kosovo against the request and warning from the UN administration, and calls for guidelines stipulating the obligation to take care of children if the UN so requests.

As the issues mentioned above are too many to fit into the scope of the thesis, I have identified some of the main problems which are important for the further discussion in chapter 5 and 6.

5.4.2 Can Children have Asylum Claims of their Own?

The argument presented by Norway to the Committee for introducing a new system for hearing children was that it was “*In order to ascertain whether children accompanied by their parents may have independent grounds for being granted asylum*”.¹¹¹ According to the Refugee Convention, the term refugee applies to any person who has a well-founded fear of persecution, regardless of age. Children can be victims of persecution because of their ethnicity (ethnic cleansing strategies), family affiliation or imputed opinions; they can have a well-founded fear of being recruited as sex-workers or child soldiers, of domestic violence, or of being forced to marry at a young age. Traditionally, Norwegian asylum authorities have used a rather narrow definition of persecution as being mainly political persecution. In many countries, political activities are reserved for men. However, also family members can be affected by the activities of their male relatives and be accused of collaborating with their husband, brother or father; and experience harassment, threats and persecution on the grounds of imputed opinion. A broader use of the

¹¹¹ Norway’s Third Report to the UN Committee on the Rights of the Child (2003) para. 511
http://odin.dep.no/filarkiv/179166/Barnets_rettigheter_-_engelsk_versjon.pdf (emphasis added)

refugee definition has therefore long been called for by organizations working with asylum seekers; one where also ethnicity, religion and social group are included as legitimate grounds for asylum. Age still is not recognized as social group criteria, which describes inherent, unalterable characteristics like gender or sexual orientation. Persecution on these grounds is increasingly taken into account by Norwegian authorities. Girls are often affected by gender-specific persecution, like trafficking or harmful traditional practices of female genital mutilation or forced marriage. Other kinds of persecution is child-specific, as one can witness in the LRA's forced recruitment of child soldiers and sex-slaves in Uganda. UNHCR is currently working on guidelines on age-specific persecution, and one may hope that this will contribute to more attention to the fact that children could potentially be victims and targets of persecution.

The study by Cecilia Baillet found that "Children's rights are underrepresented because as dependents, their own rights were not always addressed, most often reference to the children's needs or interests were cited as meriting protection on compassionate grounds, not asylum".¹¹² The report found that one of the reasons for the low asylum rate was the lack of a systematized approach to the use of human rights standards in the analysis of claims.¹¹³ Baillet recommends that individual analysis should be made in all cases involving children in order to assure due process rights and preserve the integrity of the asylum system. She asserts that the application of the Refugee Convention calls for interpretation via the CRC, and proposes to make Guidelines on Children based on CRC in order to recognize how children experience persecution.¹¹⁴ The study criticizes the tendency of case workers only to use article 3, and recommends that case-workers thoroughly analyze and cross-reference CRC articles with respect to i.e. article 37, forced recruitment or trafficking. Baillet means that if the CRC had been used appropriately, more of the cases would have qualified for asylum instead of residence on the basis of humanitarian considerations.¹¹⁵

Kate Halvorsen also finds it problematic that children, when compared to adults, are at disadvantage with respect to refugee recognition, and suggests that opting for humanitarian

¹¹² Baillet (2004) p.68

¹¹³ Ibid, p.57

¹¹⁴ Ibid, p.67

¹¹⁵ Ibid, p.77

protection may sometimes be the easy way out of a complicated and difficult dilemma, as thorough assessments of asylum claims are complicated and time-consuming.¹¹⁶

5.4.3 Age limits

The Convention sets no minimum age at which children can begin to express their views. On the contrary, the CRC discourages the use of age limits. Article 12.1 requires States to assure to every child “capable of forming his or her own views” the right to express those views. According to Unicef’s Implementation Handbook; “It is clear that children can and do form views from a very early age, and the Convention...provides no support to those who would impose a lower age limit on the ascertainment or consideration of children’s views”¹¹⁷

The Swedish Migration Board does not have minimum age requirement on child conversations. Case worker Kicki Kjämpe told me that the Board talks to children as young as 3- 4 years old. Such conversation are short and take place in a less formal setting, and are sometimes just to meant to make sure that the child in fact belongs to the family.¹¹⁸

Norway’s 2003-report informs that the Immigration Regulations § 54’s fifth paragraph has been amended, and that “as a general rule all accompanying children must be interviewed”.¹¹⁹ Given the fact that all children over 12 years old have only been heard since March, 2006, this statement was not accurate. In any case, Article 2’s non-discrimination clause implies that any differential treatment of Norwegian and foreign children must be grounded in objective criteria. I do not see any objective reasons for why one should not talk to children younger than 12 years old in the asylum procedures, when Norwegian children are given the opportunity to express themselves from the age of 7, pursuant to the Children Act, section 31.

From these arguments I will conclude that within the meaning of the Convention, the Norwegian asylum authorities should repeal the age limit of hearing children. If a minimum age is to be

¹¹⁶ Halvorsen (2005)p.72

¹¹⁷ Hodgkin (1998)p.149.

¹¹⁸ Personal comment, 16.05.2006

¹¹⁹ Norway’s Third Report to the CRC Committee (2003), para.146.

http://odin.dep.no/filarkiv/179166/Barnets_rettigheter_-_engelsk_versjon.pdf

continued, it should at least be lowered to the limit of 7 years set by the Children Act. This view is supported by all the organizations. The authorities seem to be aware of the problem, and signal that younger children will be heard once the necessary resources are in place. As the Committee has emphasized that implementation of article 12 “cannot be dependent upon budgetary resources,”¹²⁰ I anticipate that this will be a priority for the administration.

5.4.4 Should parents decide?

Parents may object if they do not want their children to be interviewed by the UDI. They are informed that this will not have any effect on the outcome of the application. According to UDI, a ‘substantial number’ of parents decline. Is this unproblematic?

The CRC gives parents the right to take the main responsibility for their children. Article 5 requires States Parties to “respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance” in the exercise of the rights set forth in the Convention. It may be hard for authorities to assess whether it is the child or the parent who decline, although it is not very likely that a child would talk to authorities against the will of his or her parents. NOAS representative Sylo Taraku at Tanum reception centre told me that most parents find it strange that the authorities want a conversation with their children. Most come from cultures where talking to children is uncommon and are sceptical towards letting their children talk to UDI because they think this may be used as a means of controlling the information provided by the parents. NOAS encourages all parents to let UDI talk to their children unless the children decline.¹²¹

A prerequisite for being able to participate and express its views is that the children are given adequate and relevant information about the purpose of the conversation. More importantly, their parents must be well informed since they in practice make the choice. The parents must not be the main hindrance for the child’s voice to be heard.

¹²⁰ Hodgkin (1998), p.152

¹²¹ Personal comment, 25.04.2006

5.4.5 Should parents be present?

Regulation 55a (3) requires at least one parent to be present at the conversation. Based on the provision's wording, this practice may be questioned. Article 12.1 obliges the State to assure to the child "the right to express [his or her] views freely". One of the objections raised by UDI employees to hearing children is the doubt that they would speak freely with their parents present; for example, where there is suspicion of abuse, or where the child has been instructed by his or her parents to tell a false story about the family's background. This view is understandable, but it also witnesses the scepticism among many employees of the asylum seekers' motives. Children may also be hindered in talking freely because their parents answer questions meant for the child, and thereby "take over" the interview. The caseworkers illustrated another challenge posed by the requirement by telling about a conflict with a Kurd father who did not want to be present at his daughter's testimony. She had been raped and, although the father probably suspected it, he did not want to hear of it because of the cultural honour code. In these cases, the parents may sign away the right to be present.

The child expert at the UDI interview section emphasizes the positive aspects of having parents present at conversations. For most children it will be comforting to have their parents at hand. They are in a new country, and with possible bad experiences with authorities from the country of origin, talking to foreign authorities may be overwhelming. If not present, the parents could feel that this was a secret conversation between the child and the authorities, and this would put the child in a difficult position. The child expert stresses that abuse is rather the exception than the rule, and that it is questionable that the short duration of an interview would reveal any of the sorts. She further hopes that parents with constructed stories will take the opportunity of reservation, thereby sparing the child from being put in a difficult position.

5.5 Who is to blame?

Through the interviews with authorities and organizations I got the impression that the two parties considered the matter of responsibility from two very different viewpoints. I noticed for example that while authorities emphasize the *parental responsibility*; dragging their children along all over Europe or not taking the consequence of a negative decision, the organizations

stress the *State obligation* to take care of children independently of their parents. For example, in an interview Secretary-General of Save the Children, Gro Brækken, said that children are suffering because the authorities do not effectuate decisions, and the children are therefore staying too long in reception centres. On the other hand, former UDI director Manuela Ramin-Osmundsen stated that the main problem is not the time that the UDI spends assessing the case, but that children are suffering because their parents do not take the consequences of the decisions and keep filing appeals instead of leaving the country.¹²²

All in all, my impression is that the government and the organizations seem to have different interpretations of the same principles. Although they may both to some extent be right, it is important to keep in mind that children are victims of their parents' decisions and should not have to suffer unnecessarily for the mistakes made by adults.

5.6 Looking to Sweden: A Child Rights Perspective

In order to get some perspective and new ideas on how children could be heard in a better way; I consulted with Kicki Kjämpe with the Swedish Migration Board (corresponding to the Norwegian UDI). In the mid 1990s, there was intense debate in Sweden on whether the country fulfilled its obligations under the CRC. At the heart of the criticism was the Alien's Act and its applied practice; in particular, concerning the lack of consideration to children and their own grounds for protection. Since then, several measures and projects aimed at improving the situation for children in the asylum process have been carried out.

In 1996, a committee was set up to revise the Swedish legislation and practice with respect to the CRC. This resulted in amendments in the Aliens Act, i.a. by including the best interests-principle and the rule of hearing children.¹²³ Pursuant to the report 'Children in Hiding', the Migration Board also started a 'children's rights project' which aimed at integrating a children's rights

¹²² Radio interview, P2 17.03.2006

¹²³ Nilsson, Eva (2005), p.73

perspective into the various processes affecting children.¹²⁴ Applying a child perspective means that throughout the whole process, as well as in the decision, the interests of the child should be elucidated. In order to safeguard children's legal protection, a project on educating interviewers was carried out. On the basis of this project, a report and an interview guide were published. One of the main ideas behind this project was that the manner in which children are being interviewed will have significant influence on what they communicate. Training and good interview techniques are therefore crucial. The important role of the interpreter as the link between the child and the interviewer was also highlighted, as translation may influence the legal safeguards.¹²⁵

With respect to the previously mentioned problems; no minimum age is set on child conversations in Sweden. Whether the child should talk to the authorities is as in Norway decided by parents. However, parents have the right, but not a duty, to be present at interviews. If both the child and the parents agree to it, the child may talk to the interviewer alone, or together with his or her siblings. Kjämpe explained that in this way, they can support each other, but perhaps speak more freely than with their parents present.¹²⁶

In written decisions, case workers are required to clarify whether or not the child has been heard as well and what resulted from the investigation. The grounds must indicate in what way the child's views have been taken into account and whether or not these arguments have affected the outcome of the case. An evaluation of decisions has recently been undertaken in order to develop the argumentation of case workers.

Training and regular follow-up and personal supervision of case workers has also been a priority of the Migration Board: "Crucial to this process is the application of [a child perspective] in their day to day work. Staff skills and common values must be constantly developed through regular exchanges of experience."¹²⁷ The latest measure was the transformation of the Aliens Appeals

¹²⁴ http://www.migrationsverket.se/infomaterial/om_verket/barnrapp_en.pdf

¹²⁵ Cederborg, Ann-Christin (2004) p.5

¹²⁶ Personal comment, 16.05.2006

¹²⁷ http://www.migrationsverket.se/infomaterial/om_verket/barnrapp_en.pdf : 7

Board into an administrative court in March, which will improve transparency and procedural rights for asylum seekers.

6 Are children's views given due weight?

Article 12.1 of the CRC not only requires States Parties to assure children the right to express their views, but their views are also to be given due weight. The rule thus contains both a procedural and a material part. The most controversial issue may thus not be whether children should be allowed to participate, but what the authorities should do with the information provided by the child: What weight should one accord the statements of a child? This is a question which plunges deep into asylum policy and the authorities' outlook on children. The right of children to influence decisions taken in their regard is in my opinion the biggest challenge and may answer the question of whether children are really seen as individual right-holders in the asylum proceedings.

6.1 How much weight should one ascribe the views of the child?

The extent to which the outcome of the conversations is actually reflected in the asylum decision is hard to assess. Article 12 requires the views of the child to be emphasized in accordance with his or her age and maturity. How mature a child is at a given age is of course individual and may be difficult for authorities to estimate during the short meeting of a conversation. According to the Handbook; "(...) provisions that specify an age at which the child's views should be taken into account are questionable, since the expressed views of children of all ages should be considered under article 12"¹²⁸ If an age limit nonetheless is to be set, article 31 of the Children Act may act as a guiding principle: "When the child has reached the age of 12, great weight shall be attached to the child's wishes." Also the Public Administration Act's section 17 requires appropriate weight to be attached to the child's views "in accordance with their age and state of maturity." The "due weight"-requirement is however lacking in the provision in the Immigration Regulations. I would nonetheless assert that the requirement that children should not only be

¹²⁸ Hodgkin(1998),p.126

heard as a matter of procedure, but also as a matter of substance, should also be taken into the Regulations in accordance with the other provisions mentioned above.

An example from the Supreme Court illustrates that the views of children in Norwegian law may potentially be ascribed decisive weight. A 12-year old boy had been living outside the home for three years, and wanted very strongly to move back to his mother. The Court was in doubt that the mother would be sufficiently able to care for him, but the boy had such a strong will that staying with his foster family did not seem like a good alternative, although this otherwise was considered to be in the boy's best interest. The Court consequently decided that the boy should move back to his mother.¹²⁹

The UDI circular emphasizes that what the children tell may have consequences for their future; and that the situation of the child should be elucidated and made visible in the decision. However, representatives from both agencies state that "if the child is heard it shall be credited importance, but not decisive importance".¹³⁰

A logical consequence and ultimate test of the due weight-requirement is that if the parents have a weak case but the child has a strong one, the family could potentially be granted residence permit on the basis of the child's testimony. According to my respondents, this does not happen today. On the contrary, a UDI representative told me of widespread reluctance against hearing children whose families were in the 48- hour procedures (the so-called "evidently unfounded" applications), because no matter what the child said, these were bound to be sent home anyway.¹³¹ Of course, the right of children to have their views given due weight does not imply that children should decide the outcome of a case. However, for the right to be effective children should be involved in decision-making in the sense that their opinions should be *potentially* decisive. The references to the "evolving capacities" of children also imply a developing ability for decision-making.¹³² If children are only heard as a manner of procedure, without it having any actual effect, then it is just a right on paper.

¹²⁹ Rt-2004-999, para. 65(my translation).

¹³⁰ Personal comment, UNE 28.04.2006, UDI 22.11.2005.

¹³¹ Personal comment, 13.03.2006

¹³² Hodgkin(1998), p.145.

6.2 Decisions

6.2.1 Balancing interests

When deciding whether a family should get residence on equity grounds, two processes are involved. First, the case worker needs to make an assessment of what constitutes the best interests of the child in the given case and balance these interests against other considerations, like immigration control. Secondly, the principle must be weighted against other arguments, like the law and preparatory works.

Article 3.1 of the CRC establishes that the best interests of the child shall be a primary consideration in all actions undertaken by administrative authorities. As stated before, the wording “a primary consideration” signifies that the best interests of the child will not always be the overriding consideration; there may be “competing or conflicting *human rights* interests”.¹³³ In a total discretionary assessment, authorities are not precluded from attaching weight to other factors than the best interests of the child, cf. a decision from the Appeal Committee of the Supreme Court.¹³⁴ The administration has relied heavily on this court practice when balancing the interests of children against other interests, like immigration control. However, the Implementation Handbook contends that in situations where the best interests of individual children in particular circumstances is to be decided; the meaning of the Convention is that the interests of the child shall be “*the* paramount consideration”.¹³⁵ According to Philip Alston, the obligation of the State Party spelled out in paragraph 2 of article 3, “to ensure the child such protection and care as is necessary for his or her well-being” is of fundamental importance.¹³⁶ The well-being of the child should therefore constitute an important part of the agencies’ assessments.

¹³³ Ibid,p.40 (emphasis added).

¹³⁴ Rt-1993-1591 (566-93)

¹³⁵ Hodgkin(1998),p.41

¹³⁶ Alston, P. *Bulletin of Human Rights* 91/2, “The Legal Framework of the Convention on the Rights of the Child.

6.2.2 Exercise of discretion

The authorities' exercise of discretion pursuant to the Immigration Act's §8 second paragraph and the Regulations' §21 may be made when there are compelling reasons or when the foreigner has a special attachment to Norway. The provision reads "may" and there are no explicit guidelines for the discretion. According to the Act's preparatory works, the intention was for the provision to be a narrow exception to the rule. This has also since been the administrative practice.¹³⁷ UNE's decision of whether such a permission should be granted is subject to the administration's free discretion; thus limiting the possibilities of review by the courts. NOU 2004:20 reads:

"After the authorities have considered the principle of the best interest of the child in the individual case; Article 3 does not provide directives for the outcome of the discretionary assessment. Opposing considerations; such as the consideration of a controlled and regulated immigration, could therefore be credited as great or even greater importance" (my translation).¹³⁸

In its hearing statement, UDI remarks that cases involving children should have priority in all parts of the asylum administration.

"The need of the child for an expedient clarification must nevertheless be balanced against the requirements of a proper procedure in each case. In cases where children are affected by the authorities' decisions, assessments must be made where interests on immigration regulation must be balanced against the best interests of the child".¹³⁹ (my translation)

In a contribution to the Dagbladet newspaper, UNE's Director, Terje Sjeggstad, argues that balancing different fundamental considerations may entail giving some families residence permit even though immigration policy considerations would weigh against it. In other cases, it will lead

¹³⁷ UDI hearing statement, p 10-15

¹³⁸ NOU 2004:20 New Immigration Act 4.10.3.1 p 92

¹³⁹ UDI Hearing Statement to the new Immigration Act: p 15

<http://www.udi.no/upload/H%C3%B8ringsuttalelser/UDIs%20h%C3%B8ringsuttalelse%20NOU%202004-20.pdf>

to families with children being returned, “even though an isolated assessment on the best interests of the child would indicate that they should have been granted stay”.¹⁴⁰

In the following section, I will provide some examples where the two interests have been balanced against each other.

6.2.3 Cases

NOAS has on several occasions criticized UNE for not complying with recommendations and warnings from the UNHCR and other UN-organs when returning children with life-threatening illnesses.¹⁴¹ Two cases involving return to Kosovo have in particular been raised in the media. 6-year-old Gresa Korcaj died January 1st 2005 after having been forcibly returned to Kosovo by Norway six months earlier. Gresa was seriously multi-handicapped and was returned despite of recommendations and warnings from the local UN-administration in Kosovo. Dardan Daka was 8 years old upon return, and suffered from brain damage and serious epilepsy. Also here, the UN-administration strongly advised against the return to Kosovo. It appears from both cases that the motive of seeking asylum was medical treatment, not persecution. Both decisions are long and detailed with respect to grounds, and serve as an illustration for cases where immigration authorities have weighted the best interests of the child in favour of immigration control. An application for asylum can thus be rejected in order to prevent further immigration on similar grounds, even though strong humanitarian considerations exist.

In the Gresa-decision UNE wrote: “In such a case, there is reason to highlight the importance of immigration political considerations, as a positive decision potentially could have very large consequences”.¹⁴² It further stated that the assessment in particular had taken into consideration that the decision concerns a small child; “without this being credited as of decisive importance”. Kosovo was referred to as a “refugee-producing” country; and the Board asserted that “If [health reasons] were decisive, inhabitants of most of the world’s countries would potentially qualify for humanitarian protection in Norway”. Further, UNE found it necessary to set a high threshold in

¹⁴⁰ Sjøggstad, Terje. Contribution to Dagbladet newspaper, 30.12.2005. www.une.no (my translation)

¹⁴¹ ”Utlendingsnemnda og FN”. <http://www.noas.org/Dbase/nytt/11094219298587.shtml>

¹⁴² UNE-decision (my translation)

such a case, “because the principal motive in the application for asylum seems to be to give Gresa the best possible medical treatment”. The Dakan-decision stated the following:

“In the present case, it is obvious that immigration policy interests are affected to a great extent. The consequence of a possible grant might be that victims of road accidents from countries with a less developed health system than Norway would lay claim to residence permit in Norway due to the demand of equal treatment in similar cases”.¹⁴³

Several organizations have criticized the authorities for using these children as a political means to set a warning example. NOAS questions whether there is a real risk that children suffering from similar illnesses would seek asylum in Norway, and finds it unacceptable that children are put in a position offering increased suffering and greater danger to their lives based on such speculations. The organization criticizes the fact that the Immigration Act Committee has proposed a change of name to “immigration regulating considerations” without changing the actual content of the term. NOAS calls for regulations “securing that the [immigration control] happens in a manner which attends to strict requirements to legal safeguards and that one generally need not be ashamed of”, as stated in the preparatory works of the present Act.¹⁴⁴

In a recent case from the Oslo City Court,¹⁴⁵ a 22-year old woman from Iran and her 7-year old daughter won a suit against UNE; which in November 2005 had rejected their asylum application. At the age of 14, the woman was forcibly married to a man twice her age, and one year later gave birth to her daughter. She claimed that she had come to Europe in order to get medical treatment for her daughter, and later decided to escape her abusive husband. The Court did not find the plaintiff eligible for asylum, as she had failed to adequately prove the alleged abuse by her husband and family in the past, as well as to prove that there was a substantial future risk that she would be abused or killed by the family. The question to be considered by the Court was thus whether there were “compelling reasons” or “special attachment to Norway” which could qualify for residence permit. In its decision, UNE had discussed whether a return to Iran

¹⁴³ The Dardan Daka decision of 05.11.2004 (my translation)

¹⁴⁴ Steen, Rune: “Masseinnvandringens trussel” (my translation)
<http://www.noas.org/Dbase/nytt/print/114198612173909.shtml>

¹⁴⁵ Oslo Tingrett

would be inadvisable and whether the decision would touch upon immigration policy considerations. The girl concerned has a congenital heart defect requiring follow-up and medication, and UNE's discussion was made basically on the background of her health problems. However, the heart disease was not found to be of such a serious degree; "acute and life threatening" as to grant a residence permit. The Court held that the decision's main problem was the fact that UNE had not made a thorough appraisal with respect to the best interests of the child, as provided by the CRC. UNE argued that the reference to the CRC made in the first instance (UDI) made this unnecessary. It had been more than four years since the mother and child came to Norway, and although the girl speaks Norwegian fluently, she hardly understands her mother's language. Furthermore, the father was according to Iranian law likely to get the responsibility for the child upon return. Despite of these facts, neither the long case-handling time nor the caring situation upon return was discussed by UNE. The Court held that the long case-handling time involving a small child constituted a procedural error, and that based on compelling reasons and the girl's attachment to Norway it would be in her best interests to stay in the country.¹⁴⁶ According to Supreme Court practice, courts very rarely set aside decisions made by the administration, cf. Rt.1997 s 1784.

The decision by the City Court is important because it underlines the requirement of the asylum administration to demonstrate in the decision that the best interests of the child has been explored and taken into account as a primary consideration.

All three cases were related to the health situation of small children. Whereas it in the Gresa and Daka-cases was no claim of future persecution, the Iranian case was more uncertain. Another common factor was that the cases were decided by Board leader alone, which indicates that there were no significant matters of doubt. It is explicitly stated in the Iranian case that if the best interests of the child, not the situation of the mother, had been the main issue; there is reason to believe that a Board meeting assessment would have been necessary.¹⁴⁷ The representatives of all the organizations I talked to held that the best interest-principle is used as empty rhetoric by the authorities, without making a thorough assessment of each individual case. They question whether a caseworker or Board leader with a legal background is competent to determine what

¹⁴⁶ Decision 08.05.2006 <http://www.domstol.no/archive/Osloetingrett/Nye%20avgjorelser/asylsak.doc>:17

¹⁴⁷ Ibid p 17

constitutes the best interest of a child they have never met, and call for more expertise in order to make enlightened decisions.

Nonetheless, assessing protection-needs is a difficult task. The administration is required to follow certain regulations provided by political authorities. Board leader with UNE, Anne Bruland points out that the asylum administration's primary task is to assess whether persons have a need for protection from the country of origin. If not, the rule is that he or she cannot stay. Further, Bruland says that if the best interests of the child are to always be the decisive matter; politicians will have to provide for this in regulations and guidelines.¹⁴⁸

Although one may question the argument of how many people would attempt to get residence on this background, a requirement of the administration is that "similar cases should be treated in a similar manner", and there is a real risk of abuse of the asylum function. The Immigration Regulations §5 provides that medical treatment may be given to foreigners as long as it is paid for; hence, applications for asylum on medical grounds could be posed for economic reasons. The ethnocentric view; that it is almost always best for children to stay in Norway, regardless of linguistic or ethnic background, has been rebutted by the asylum authorities; arguing that culture and family ties may be equally important as a having a materially high living standard.

6.2.4 The content of grounds for decisions

In this section, I will briefly introduce the issue of standardized decisions. Lacking a sufficient quantity of decisions from both agencies leaves me unable of making a thorough analysis of the argumentation in the decisions. Constituting a central critique of the asylum procedures, the issue of content is however important to discuss.

The Public Administration Act's §24 lays down the requirement to provide grounds for individual decisions, and §25 stipulates the requirements for the contents of these grounds. Grounds shall refer to the rules on which the administrative decision is based; their content or the assessment of the problem on which the decision is based.

¹⁴⁸ Personal comment, 28.04.06

“The grounds shall also mention the factual circumstances upon which the administrative decision is based...Mention should be made of the chief considerations which have been decisive for the exercise of the administrative agency's discretionary powers.”

The practice of standardized answers has been criticized by several scholars and organizations. By standard answers, Cecilia Baillet means the “cut&paste” techniques in which standard formula responses...are copied and placed within decisions.”¹⁴⁹ Baillet argues that standard answers should not be used because it excludes individual assessments and leads to more rejections. Baillet sees the practice as a result of the “overwhelming pressure” placed on both UDI and UNE to be effective, but also due to reluctance to new and innovative interpretation of provisions by the agencies.

NOAS has also criticized the phenomenon of standardised decisions. When the decision does not give details of how particular considerations have influenced the outcome, it is very difficult to consider the background for any appeal. As previously mentioned, NOAS has proposed a special obligation to explicitly state the grounds for rejection in decisions concerning children. Although the Immigration Act Committee discussed the pedagogical value of including such an obligation, this was not proposed in the new Act. The Committee concluded that the problem was not the Public Administration Act, but rather, the agencies` application of the law.¹⁵⁰

Anne Bruland holds that the use of standardised decisions also has positive aspects, because it makes sure that the necessary formulations are put in the decisions, and also forces the case worker to consider all aspects of the case.¹⁵¹ A practical problem faced by the authorities is the pressure to produce decisions within a reasonable time. As Bruland points out; effectiveness is also an important requirement of due process protection. This point is maintained by the Committee, which holds that standardized answers may be used as long as they are applied with

¹⁴⁹ Baillet, 183.

¹⁵⁰ NOU 2004:20 p 326.

¹⁵¹ Personal comment, 28.04.2006

caution; adjusted to the circumstances of each case and satisfying the requirements of the Public Administration Act.¹⁵²

A typical decision from UNE now states that the CRC following the implementation has a status of Norwegian law, but that it “as far as the asylum authorities are concerned, this has not entailed a substantive change (“realitetsendring”) since the Convention was already incorporated through the Immigration Act §4”.¹⁵³ Further, Article 3 of the CRC is quoted and states that the provision does not in itself provide for residence in Norway, but that it imposes the authorities to attach importance to the best interests of the child.

In case of a negative decision, the following assessment is made:”The Board is of the opinion that it will not be contrary to the CRC to return the child/ren to the country of origin”. The standard refers e.g. to the child’s attachment to Norway, his or her health situation and the possibilities for receiving treatment in the home country, that the child will return together with parents and siblings and that nothing suggests that the parents will not be able to provide sufficient care.¹⁵⁴

To sum up; it is ethically unacceptable if the best interests of the child must yield to the wish to prevent asylum-seekers from coming to Norway. Nonetheless, the culpability does not only belong to the bureaucrats; one needs to place the responsibility also with the politicians who are making the regulations.

6.3 Assessment of the Administration’s Implementation of the CRC

The organizations seem to be somewhat disappointed in the effect of the implementation of the CRC. Save the Children points to the standardised decisions and argues that there have been certain changes in theory, but not in practice. NOAS also finds the changes to be of a more cosmetic nature and refers to the request to the ministry for clarifying the issue. PRESS is more positive and emphasizes that as a consequence of the implementation, the promoters of children’s

¹⁵² NOU 2004:20 p 326

¹⁵³ Template provided by UNE,03.05.2006

¹⁵⁴ Ibid

rights now have a powerful tool of advocacy. Pressure from organizations has led to marked changes for unaccompanied minors, and also in the attitude of the asylum authorities.

According to the agencies, the implementation has not had any major effects so far. Case workers in the UDI affirm that as of yet, the implementation has not had any significant implications for administration. However, the case workers do think that the increased societal focus on children in general in later years may have had an indirect effect of setting children on the agenda, and that the UDI is now increasingly observant to the needs and rights of asylum-seeking children.¹⁵⁵ According to UNE, the implementation “has not led to any substantive changes”, since the Act’s § 4 already included human rights obligations. Bruland nevertheless points out that increased focus on human rights in general has led to more attention on children in asylum cases, and that case workers now are offered courses and seminars in children’s rights.

All in all, one may conclude that although the implementation of the CRC this far may not have had any major practical implications for the asylum administration; its status as Norwegian law has generally led to more focus on children’s issues and shed light on the problems inherent in not treating children as individuals in the asylum process. The public administration is a cumbersome system which needs time to change. In the time to come, the use of the Convention by Courts and authorities will surely put more strength behind organizations’ demands. It is my sincere belief that the Convention holds great potential for the promotion of children’s rights in the asylum procedures, and it will be interesting to follow the future development of this area.

¹⁵⁵ Personal comment 22.11.2005

7 Concluding Remarks

7.1 Is Norway fulfilling its obligations?

Until a few decades ago, the saying “children should be seen and not heard” was a well-known principle in Norwegian homes and schools. Since then, the philosophy of child upbringing has changed markedly; to the idea that not only should children be seen, but also heard. The right of children to participation is stipulated in Norwegian laws pertaining to children, and is a core standard in the CRC. I wanted to investigate whether this principle was upheld with respect to asylum-seeking children in Norway. Based on the critique put forward by NGO’s and the CRC Committee, the thesis set out to explore how children are heard in practice in asylum proceedings, and to what extent the views of the child are reflected in the outcome of the case. To what degree are children in families made visible in the asylum process and not merely treated as appendages to their parents?

7.1.1 Shortcomings and recommendations

Based on the foregoing analysis, I will provide an evaluation of Norway’s fulfilment of its CRC obligations. The assessment will take the research questions posed in the introduction, the interviews and the requirements made by the CRC Committee¹⁵⁶ as its starting point.

First, I found that the asylum procedures with respect to child conversations are still not sufficient as to satisfy the requirements following from Article 12. Although UDI has recently put effort on carrying out conversations with children, there is still resistance among employees to the value of hearing children. An age limit on conversations is not consistent with Convention principles and

¹⁵⁶ See chapter 3.5

if such a limit is to be set, it should be in accordance with Norwegian laws on hearing children. As the main responsibility to hear children lies with UDI, UNE hears children only to a limited extent. Still, UNE has potential for letting children participate in Board meetings to a much larger extent than what is currently being done. Not enough emphasis has been put on the training of case workers and interviewers in hearing children and in emphasizing their opinions.

Secondly, the views of the child do not seem to be given sufficient weight in decisions. Due to the limited grounds provided in decisions, it is difficult to see how their views have influenced the outcome, as required by article 12.1. Although the Regulations provides for hearing the child, the law is silent on giving the views of the child due weight. This should be changed to match the provisions of the other laws on children. The principle should also be incorporated in the new Immigration Act, along with the best interests-principle.

Thirdly, the reasoning method used by case-workers is standardised and closed; making the reasoning hard to control and appeal. Although this strictly is not contrary to legal formalistic requirements, the serious consequences of the decisions could give reason for making it a requirement to explain grounds in cases involving children, as proposed by NOAS. The CRC is not used to its full extent in decisions. A wider range of the Convention's articles could, and should be used in the assessment. For the most part, the only CRC principle referred to in decisions is the best interests-rule. UDI also increasingly includes a reference to Article 12, noting that the child has been heard. Voluntary training of professionals in using the Convention principles is increasingly offered by asylum agencies, but this should be made mandatory.

Furthermore, the best interests-principle is not always analyzed in decisions. Sometimes, it is merely stated that a return is not contrary to the best interests of the child, without providing the grounds for this assessment. To which degree the child's interests are considered by authorities is unclear, and this is a major concern by the organizations presented; holding that decisions should show how the principle has been taken into consideration. The recent judgment from the Oslo City Court against UNE may prove to have effect for future assessments by the agency; requiring a thorough analysis of children's interests to be made.

A central critique towards the prevailing asylum practice has been the balancing of the best interests of children with the interests of the state to prevent certain groups of asylum-seekers from coming to Norway.¹⁵⁷ Where the theoretical debate on the principle has discussed whether the best interests should be *a* primary consideration or *the* primary concern, we have seen that the authorities in a number of health-related cases have chosen immigration-considerations as the prevailing interest. Sending seriously ill children back to a country without an adequate health care system would hardly qualify to “ensure children such protection and care as is necessary for their well-being”, as provided by Article 3.2.

With respect to Article 22, there is generally insufficient statistical information on asylum-seeking children. Improved statistical information should be a priority of the administration, as it contributes to making these children visible. Finally, States are asked to provide information on evaluation mechanisms to monitor the progress in the implementation of the Convention. Such mechanisms are needed, both with regard to interview procedures and the writing of decisions. Moreover, there is need for a general evaluation for the relevance and implications of the CRC to the field of asylum, as requested by the organizations in the study.

Based on my earlier assessments, I conclude that children coming to Norway as asylum seekers are not fully treated as individuals in the administrative proceedings. Given the major consequences of the decisions for these children, more emphasis should be put on providing these children proper consideration corresponding to their Convention rights.

All that being said; the immigration authorities do face very difficult dilemmas when carrying out their mandate. The agencies have an extensive scope of interpretation and discretion, which is limited by the pressure to produce decisions coming from the media and political authorities. Procedural requirements call for a thorough assessment of applications, but to prevent families from waiting too long an expedient procedure is at the same time required in cases involving children. Rules and regulations and the exercise of discretion in asylum cases should be an important topic in the Norwegian societal debate. The mentioned organizations require a thorough inquiry of the effects and implications of implementing the CRC into Norwegian law

¹⁵⁷ E.g. families with seriously ill children.

for the area of immigration. It is also my opinion that before the new Immigration Act is passed, such an evaluation is essential. In order to create lasting change, structural amendments and political initiatives are critical, while NGO`s have to continue their pressure on the asylum authorities.

Based on suggestions from organizations, I have made some recommendations which I have included as Appendix 1.

7.1.2 The Scope of Positive Obligations: What should one expect from Norway?

In September 2005, the UNDP Human Development Report for the fifth year ranked Norway on top as the best country in the world to live in.¹⁵⁸ Norway is one of the richest countries in the world, and is by its own nationals looked upon as a major advocate for human rights. Fulfilling the CRC according to own abilities means that one has to demand a high standard of countries like Norway, which in this respect has the opportunities and resources to be a preceding country in upholding human rights. While Norway aspires to project the image abroad of a humanitarian state, promoting peace and human rights; it is important to keep in mind that the children we like to help in refugee camps or conflict situations abroad should be treated with the same respect once they have entered Norwegian territory. In an international context, Norway has in many respects come far in the matter of hearing children. I will however contend that Norway still has some way to go in order to fulfil the CRC in the field of asylum. Above all, this is a classical example of a “de lege lata” versus “de lege ferenda”-debate.¹⁵⁹ While the country does possess the necessary human and economic resources; what is lacking is political will to put asylum-seeking children on the top of the agenda.

¹⁵⁸ The countries are ranked according to their score on the human development index, measuring among others; life expectancy at birth, adult literacy rate, school enrolment and GDP per capita.

http://hdr.undp.org/reports/global/2005/pdf/HDR05_HDI.pdf

¹⁵⁹ Meaning “the law as it is versus the law as it should be”

7.2 The Difficult Balance: Immigration Control versus Humanitarian Considerations

With the establishment of new and increasingly advanced control measures, the last decade has witnessed a coordination and restriction of Western European immigration policies. One of the aims has been to limit the entry of asylum-seekers to European territory, as this also limits the obligations of states. The self-interest of countries in keeping some categories of people out poses important questions as to how far one can go in relation to human rights considerations. The refugee right to protection is not the priority, rather, it is the protection of states from refugees which seems to be most important¹⁶⁰

Keeping this in mind; Norway is a part of Europe and its asylum policies will have repercussions for the number of asylum-seekers the country will receive. Liberal asylum policies with respect to children and families serve as “pull” factors which attract more asylum-seekers. On a European basis, Norway already leads a rather liberal policy towards families. Sadly; the fact is that children suffering from war, hunger and abuse in the world are rather the rule than the exception. Although conditions are not perfect for children in Norway either; children do as a rule enjoy good legal protection. The authorities hold that the solution not is to save everyone through the asylum function, because this should be reserved for the people meriting protection from persecution. Rather, Norway should promote peace, democracy and development abroad to remove some of the main reasons for flight, namely conflict.

7.3 Recent Positive Developments

In general, there is now significantly more focus on children in asylum proceedings than it was at the time of the Committee’s Concluding Observations in 2000. To what extent the changes are brought forward by the implementation of the CRC is unclear. Nonetheless, the implementation has led to more attention to children’s rights in the immigration administration, and there is now scope for applying the CRC as Norwegian law and complaining to the courts. Much has been done in the field of unaccompanied children, probably as an effect of heavy pressure from organizations and much exposure in the media. We are now witnessing a change of focus towards

¹⁶⁰ Bø, Bente Puntervold: ”Søkelys på den norske innvandringspolitikken- etiske og rettslige dilemmaer”. Høyskoleforlaget, 2004: 163-164

children in families, which hopefully will lead to improvements in practice for this group. The increased focus on children in UDI is manifested by, among others, its upcoming spring conference on the topic of children in the immigration administration. Furthermore, the Directorate is also preparing own information programmes directed towards children. Both agencies now offer courses in the CRC for interested case workers. The most recent improvement is a new statement from the government where it pledges to have a “particular focus on asylum-seeking children`s rights and circumstances of life”.¹⁶¹ The government promises to liberalize the prevailing practice by emphasizing children`s attachment to Norway to a greater extent in asylum cases. If followed through, this will be a positive step towards increased legal protection of children seeking asylum.

¹⁶¹ AID Innvandringsnytt (31.05.2006)

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9 Appendices

Appendix 1: Recommendations

- **Age limits**

Although the CRC does not set any age limits for hearing the child and one should be careful with giving too specific guidelines in this respect, the Children Act can provide some guiding principles. Children should have an absolute right to be heard from 7 years old, and considerable weight should be given their views after the age of 12. Both parents and child should be given thorough information about the consequences of hearing the child. The child itself should be responsible for accepting or declining the conversation, especially if he or she is above 12 years old. The parents should as a rule be present if the child so wish, but for children above 12 years of age, a public counselor could act as the adult support. In this respect, the attention would be on the child, and he or she will be able to speak freely without having to worry about the parent.

- **Decisions:**

Own cases or files and decisions would oblige the administration to assess the experiences and situation of each child individually. The case worker should have to specify in which ways the best interest of the child has been assessed in the decision. The actual effect of hearing children should be evaluated and specified. Written decisions should be guided by the child perspective. Application of discretionary assessment is hard to give guidance on, as each situation is individual and different. However, adequate training is important, and every case has to be handled individually. Guidance should be given as far as possible, providing examples from similar cases. The application of the law by case-workers should be monitored regularly, and grounds should be thorough enough to make the inherent dilemmas visible.

Particular requirements for stating the grounds in cases involving children, as suggested by NOAS, should be discussed.

A wider range of the Convention's articles could, and should be used in the assessment.

Today, awareness of the terms and implications of the Convention on the Rights of the Child tends to vary among Administration staff. Instruction and courses in the content and implementation of the Convention on the Rights of the Child should be mandatory for people working on children's cases.

- **Case workers and interviewers:**

Case workers should be given solid training in interview techniques, including regular follow-up and personal supervision. The case-workers' task is to take the child's view into account together with other elements in order to find the best interests of the child and make an enlightened decision. The decision-maker should consider those views in a manner consistent with the child's age and maturity and needs to be aware of situations and factors which could make the views of the child the decisive matter. Child sensitivity during the conversation means that the people conducting the interviews must be sufficiently skilled in talking to children. In order to carry out complicated impact analyses for each separate case; resources and training in the CRC, interview techniques and the implications of child-specific persecution are required.

- **Conversations with children**

More time should be spent with each child in order to establish trust (like half a day).

Although this implies more resources, Norway can afford it! In my opinion, the idea of giving parents a right, but not duty, to be present should be implemented in Norwegian asylum proceedings as well.

- **Other**

- Politicians need to increase their awareness of the situation of children accompanying their parents.
- Procedures must be more effective to avoid long-waiting families

- Statistical information on refugee children must be made. At present only statistics aggregated by gender and country is available.
- There is need for a thorough review of the impact and implication of the implementation of the CRC into the Norwegian legal framework, like the Swedish Committee (see. chapter 5.6)
- The right to be heard should be included in the new Immigration Act, along with the best interests-principle.
- Children in the asylum process must be provided information for the situation they are in and possible consequences; either the family will stay in Norway or they will have to leave the country. Uncertainty is worse than predictability (realitetsorientering).

Appendix 2: Checklist

- Is the child affected by the decision?
- Has the child been given thorough information about the alternatives and their consequences?
- Has the child been given time to think things over?
- What are the views of the child?
- To what extent have the views of the child been given weight during the decision- making process?
- Is the decision to the best interests of the child?
- Has the best interest of the child been the decisive element of the decision?
- If not, which other interests have been given primary consideration over the best interest of the child in this case?
- Has adequate care been taken to consider the best interest of the child in the decision?
- Have we made every effort to safeguard children`s rights?
- Do I have an adequate/ sufficient basis or foundation for the decision?
- Do we need more research/ evaluations/ statistics/ knowledge about the situation of children?
- Have I considered the requirements as stipulated in the Convention on the Rights of the Child throughout the entire proceedings?

Based on the report *Barnekonvensjonen: Fra visjon til kommunal virkelighet* by Martine Scheie (2005) p 41. Adjusted to fit the asylum proceedings.

